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ACCESS TO UNITED STATES COURTS BY PURCHASERS OF FOREIGN LISTED SECURITIES IN THE AFTERMATH OF *MORRISON v. NATIONAL AUSTRALIA BANK LTD.*

*Roger W. Kirby**

I. INTRODUCTION

On June 24, 2010, the Supreme Court of the United States published its opinion in the case *Morrison v. National Australia Bank Ltd.*[1] In *Morrison*, defendant National Australia Bank ("NAB") was an Australian entity with its shares principally traded in Australia that also had American Depository Receipts ("ADRs") listed on the New York Stock Exchange.[2] In 1998, NAB acquired an American entity headquartered in Florida. In 2001, NAB began a series of write-downs attributable to the subsidiary's false accounting. The

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1. 130 S. Ct. 2869 (2010).

2. ADRs represent the right to receive a specified number of shares of the issuer's common stock. Their listing on domestic exchanges represents consensual submission to domestic regulation. There are various levels of ADRs or ADSs, distinguished by a correspondence between disclosure obligations and distribution rights. The lowest level—Level 1—may be traded only OTC, but must have its shares traded at least one foreign exchange and, tellingly for purpose of predicting dissemination into the United States, publish its annual report in English on its website. Level 2 and above require filings with the SEC on Form 20-F, comparable to Form 10-K and allow for trading on the broader exchanges, such as the NYSE. *See* Foreign Issuer Reporting Enhancements, Securities Act Release No. 8959, Exchange Act Release No. 58,620, International Series Release No. 1310, 73 Fed. Reg. 58,300, at 58,301 (Sept. 23, 2008) (final rule).

The Sarbanes-Oxley Act amendments to the Exchange Act, oblige the SEC to create rules that require an issuer's principal senior officers to certify to the truth of quarterly and annual reports. 15 U.S.C. § 7241 (2002). The Act also imposes criminal penalties for truth-telling failures. The SEC accordingly passed a rule requiring those officers to certify Exchange Act filings on Form 10-Q, Form 10-K, Form 20-F (except as filed under § 240.13a-19 – shell companies) and Form 40-F (Canadian companies). Form 20-F generally obliges foreign entities that have registered ADRs and ADSs for trading on America's principal markets to provide information comparable to what is supplied on Form 10-K by domestic entities. Wide distribution and trading of shares in United States markets assures the influence of their price movements on shares of the same issuer traded abroad—efficient markets assumed—and *vice versa*.

subsidiary allegedly had manipulated its books and sent the falsely inflated numbers to the issuer's Australian headquarters, which then published the information in press releases and public filings.

The issue addressed and decided by the Supreme Court was "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[3] The Court held "section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American Stock exchange, and the purchase or sale of any other security in the United States."[4]

The stakes associated with the issue are significant. Foreign issuers "considering entering or remaining in the U.S. capital markets must face the potential world-wide litigation exposure that a U.S. securities market presence uniquely threatens."[5] Vivendi, a French company, requires no persuasion of the significance of the stakes. On January 29, 2010, a New York jury returned a verdict against Vivendi that, prior to *Morrison*, would have lead to as much as $9.0 billion of damages.[6] *Morrison* has since effected a significant reduction of those damages. Prior, three class actions against foreign issuers including claims of persons who had purchased shares on foreign exchanges had settled for an aggregate $2.0 billion.[7]

The stakes are also significant because of the number of instances where United States residents have acquired securities on foreign exchanges and who now will find themselves excluded from the protection of § 10(b).[8]

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3. *Morrison*, 130 S. Ct. at 2875.

4. *Id.* at 2888.

5. John C. Coffee, Jr., *Securities Policeman To the World? The Cost Of Global Class Actions*, N.Y.L.J., Sept. 18, 2008, at 5, col. 1 [hereinafter *Securities Policeman*]; *see also* John C. Coffee, Jr., *Two factors present foreign issuers with a quandary; Certify foreign classes only in two instances*, THE NAT'L L.J., June 11, 2007, at 12, col. 1. Professor John C. Coffee, Jr. is the Adolf A. Berle Professor of Law and director of the Center on Corporate Governance at the Columbia University Law School.

6. *Court Finds Vivendi Liable for Misleading Investors*, N. Y. TIMES, Jan. 29, 2010, at B3, *available at* http://www.nytimes.com/2010/01/30/business/30vivendi.html.

7. *See In re* Royal Dutch/Shell Transp. Sec. Litig., 3:04-cv-00374-JAP-JJH, docket entries 525 & 531 (D.N.J. Sept. 26, 2008) (order and judgment approving settlement of $89.5 million for US-purchasers); *In re* Nortel Networks Corp. Sec. Litig. I and II, civil action 01-cv-1855 (RMB), docket entry 192 (S.D.N.Y. Dec. 26, 2006) (decision and order approving settlement of $438 million in cash plus 314 million shares of Nortel common stock for the benefit of members for *Nortel I* class under class period Oct. 24, 2000, through Feb. 15, 2001, inclusive) *and "Nortell II"*, 05-md-1659 (LAP), docket entry 177 (S.D.N.Y. Dec. 26, 2006) (decision and order approving settlement of $370 million in cash plus 314,333,875 shares of Nortel common stock for *Nortell II* class under class period April 24, 2003, through April 27, 2004, inclusive); *In re* Royal Ahold N.V. Sec. & ERISA Litig., 437 F. Supp. 2d 467 (D. Md. 2006) (final judgment approving $1.1-billion settlement). *See also infra* "Conclusion" (discussion of *Royal Dutch/Shell* multi-hundred-million-dollar settlements).

8. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975) (class action, U.S. purchasers of foreign issuer's securities listed on foreign exchanges permitted to proceed when U.S.

This paper does the following. First, it summarizes *Morrison*. Second, it offers critique of the majority's opinion in that case, asserting that it overstates its claims to support in the language of § 10(b) and the Exchange Act;[9] understates or ignores text that clearly authorizes extraterritorial rights of action; overstates comity implications of extraterritorial application of § 10(b), and that the Court's professed concerns about comity are drained of authenticity because, notwithstanding *Morrison*, agencies of the United States still may pursue foreign issuers even for criminal violations of § 10(b); and misstates the Court's obligations to defer to the view of the SEC that § 10(b) does reach beyond domestic bounds, under specified circumstances.

Third and fourth, this paper describes the ways in which, despite *Morrison*, foreign investors retain access to American courthouses, even in connection with securities purchased abroad, and attempt to predict SEC and legislative responses to the decision. In these sections, we also remark upon the Court's unprovoked attack upon securities class action litigation, and note that, if one of the Court's goals was to reduce foreign exposure to American civil litigation, an unintended consequence of the decision may be to increase the volume of cases, as single forum, single class actions, may be replaced by multi-forum, and multi-class actions grounded on diverse state laws. In this section, we also conduct an abbreviated survey of the laws of several states with a view to identification of both hurdles and possibilities for securities fraud claims at the state level. An additional, unintended *Morrison*

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purchasers resided within the U.S. but U.S. purchasers residing outside the U.S. permitted to proceed only if acts of material importance in the U.S. significantly contributed to their losses); Itoba Ltd. v. Lep Group PLC, 54 F.3d 118 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996) (wholly owned subsidiary of U.S. corporation who purchased foreign issuer's securities listed on foreign exchange allowed to proceed); *In re* Alstom SA Sec. Litig., 253 F.R.D. 266 (S.D.N.Y. 2008) (class action, U.S. and Canadian purchasers of French issuer's securities listed on foreign exchanges and of ADRs listed domestically allowed to proceed); *In re* SCOR Holding (Switzerland) AG Litig., 537 F. Supp. 2d 556 (S.D.N.Y. 2008) (class action, U.S. purchasers of ADSs listed domestically and of foreign issuer's securities listed on foreign exchange allowed to proceed); *In re* Rhodia S.A. Sec. Litig., 531 F. Supp. 2d 527 (S.D.N.Y. 2007) (class action, court retained jurisdiction over foreign and US purchasers of ADSs listed domestically and over U.S. purchasers of foreign issuer's securities listed on foreign exchanges); *In re* Vivendi Universal, S.A., 242 F.R.D. 76 (S.D.N.Y. 2007) (class action, U.S., French, English and Dutch purchasers of ADRs listed domestically and of foreign issuer's securities listed on foreign exchanges allowed to proceed); *In re* Royal Dutch/Shell Transport Sec. Litig., 522 F. Supp. 2d 712 (D.N.J. 2007) (class action, U.S. purchasers of ADRs listed domestically and of securities listed on foreign exchanges allowed to proceed); *In re* Bayer AG Sec. Litig., No. 03 Civ. 1546 WHP, 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004) (class action, U.S. class member purchasers of ADRs listed domestically and of securities listed on foreign exchanges allowed to proceed); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1 (D.D.C. 2000) (class action, US purchasers of foreign issuer's securities listed on foreign exchange permitted to proceed); *Cf.*, Cornwell v. Credit Suisse Group, No. 08 Civ. 3758 (VM), 2010 WL 537593 (S.D.N.Y. Feb. 11, 2010) (class action, U.S. purchasers of ADRs listed domestically permitted to proceed, with question of standing to assert claims on behalf of U.S. purchasers of foreign issuer's securities on foreign exchange left for resolution at class certification stage).

9. The Securities Exchange Act of 1934 ("*Exchange Act*"), 15 U.S.C. § 78a, *et seq.* (2009).

consequence may discourage American and foreign investors from the purchase of securities on foreign exchanges because doing so would mean relinquishment of the protection of § 10(b). A final consequence of *Morrison*, as bizarre as doubtless unintended, is that class plaintiffs properly in the United States may well agree to release claims of those who purchased securities on foreign exchanges although the claims themselves could not have brought in American courts.[10] Whether foreign courts would honor those releases and accompanying judgments remains highly uncertain.[11] Last, we discuss post-*Morrison* decisions. These have, for greater part, expanded its preclusive effect.

II. THE *MORRISON* DECISION, BACKGROUND AND SUMMARY

A. SECURITY MARKETS PRIOR TO *MORRISON*

Since Big Bang sudden deregulation of financial markets in 1986, the advent of electronic, screen-based and computer-driven trading and investment activities,[12] the number of issuers whose shares trade on international exchanges has increased substantially.[13] Foreign issuers elect to have their securities listed and traded on various American exchanges via ADRs. As mentioned above and described at note 1, these instruments represent ownership in shares of a foreign company, with each ADR being issued by a U.S. depositary bank and corresponding to a fraction of a share, a single share, or multiple shares of the foreign stock. ADR listings are not forced upon a foreign issuer. To list securities via ADRs, issuers must undertake to satisfy specific SEC filing requirements.[14] ADRs, thus, almost always trade on American exchanges because a foreign issuer elects to have them do so, and in a manner compliant with filing requirements established by the SEC. Individual shares represented by an ADR are sometimes called ADSs.[15]

The presence of foreign securities on domestic exchanges has increased substantially over the years. As Professor Coffee describes:

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10. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 380 (1996).

11. *See Vivendi*, 242 F.R.D. at 96–106 (discussion of how different nations may respond to United States judgment in an opt-out class action).

12. *See* Nicholas Goodison, *The Big Bang: Taking on the world*, THE SUNDAY TIMES, Oct. 26, 1986.

13. *See* John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUMB. L. REV. 1757, 1771–72 (Nov. 2002) (Foreign listings on the New York Stock Exchange ("NYSE") have grown from 3.5% of total NYSE listings in 1985 to nearly 17% in 2002).

14. *See supra* note 1.

15. Coffee, *supra* note 13, at 1770–71.

> In 1990, 352 [ADR] programs from twenty-four countries were in effect in the United States . . . by 1999, this number has grown to 1,800 programs from 78 countries . . . the number of foreign companies listed on the two principal U.S. stock exchanges (the NYSE and Nasdaq) grew from 170 in 1990 to over 750 in 2000. As of April 2001, over 970 non-U.S. firms were listed on the NYSE, Nasdaq, or the Amex. [T]rading of ADRs grew rapidly, reaching $1,185 billion in 2000.[16]

As a consequence of these transnational trading activities, prior to *Morrison* fraud in securities markets had taken on an increasing international flavor, with foreigners as investor-plaintiffs pursuing remedies for market fraud exhibiting an inclination toward United States courthouses. [17] The inclination has arisen because, in many ways, United States processes seem, and are, more hospitable than foreign ones in allowing the advancement of civil causes on account of securities fraud.[18]

B. CASE LAW PRIOR TO *MORRISON*

Access to United States courts, however, is not unrestricted. Federal courts have limited jurisdiction, bound in various ways by subject matter jurisdiction, statute,[19] and case by case decisions.[20] Courts may neither enlarge subject matter jurisdiction,[21] nor diminish its scope,[22] with *forum non conveniens* doctrine representing something of an exception to the rule.[23]

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16. Coffee, *supra* note 13, at 1770–71. *See also* Foreign Issuer Reporting Enhancements, 73 Fed. Reg. 58,300, at 58,301 (Foreign private issuers submit Form 20-F with the S.E.C. to register a class of securities under the Exchange Act and annual reports in order to "elicit disclosures from foreign private issuers that [are] as equal as practicable to that provided by domestic issuers.").

17. *See supra* note 3.

18. *See Securities Policeman*, *supra* note 3.

19. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559–660 (2005).

20. *Id.* at 554.

21. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct 1937, 1945 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.").

22. Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also* Village of Westfield v. Welch's, 170 F.3d 116, 120 (2d Cir. 1999). There are, nonetheless, several traditional categories of abstention. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 43–54 (1971) (abstention appropriate where there is a pending state criminal proceeding); *see also* Burford v. Sun Oil Co., 319 U.S. 315, 317–34 (1943) (abstention appropriate to avoid interference with attempts to establish coherent state policy and issues of peculiarly local concern). Abstention also appropriate where "state and federal courts exercise concurrent jurisdiction simultaneously." *See Village of Westfield*, 170 F.3d at 120 (quoting *Burnett v. Physician's Online, Inc.*, 99 F.3d 72, 76 (2d Cir. 1996)); *see also* Dittmer v. County of Suffolk, 146 F.3d 113, 117–18 (2d Cir. 1998). Thus, a "finding that the concurrent proceedings are 'parallel' is a necessary prerequisite to abstention under *Colorado River*." *Id.* at 118. *Forum non conveniens* doctrine also provides basis to decline jurisdiction. *See infra* note 19.

23. 28 U.S.C. § 1404(a) allows a district court "[f]or the convenience of parties and witnesses, in the interest of justice . transfer any civil action to any other district or division where it might have

Prior to *Morrison*, decisions analyzing whether foreign plaintiffs may have access to United States courts often had framed the matter as one of jurisdiction.[24] Restatement (Third) of Foreign Relations Law of the United States defines subject matter jurisdiction as the power "to prescribe law with respect to a person or activity."[25] In *Hartford Fire Ins. Co. v. California*,[26] two justices bandied whether "legislative jurisdiction" may better describe "subject matter jurisdiction." More recently, some courts had begun to regard the question of whether § 10(b) applies internationally as one of statute, not of the jurisdiction of federal courts to enforce judgments that the statute had been violated. "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[27]

Morrison resolved the issue of whether the transactional reach of § 10(b) implicated jurisdictional or merely statutory concerns. Writing for

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been brought." On its face, §1404 does not authorize disallowance of jurisdiction where another country may have jurisdiction, but "federal courts retain the inherent power to refuse jurisdiction of cases not within §1404(a) - cases which should have been brought in a foreign jurisdiction, rather than in the United States." Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956). But to achieve this result, a defendant would have to show a "balance [ ] strongly in favor of" the move. *Id.* at 645–46. This may be difficult given the advantages to a foreign plaintiff of pursuing securities fraud claims in the United States.

24. *See Morrison*, 130 S. Ct. at 2876–77 (collected authorities). The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), addresses subject matter jurisdiction of antitrust claims by foreigners that purchased product outside the United States from United States purchasers. 15 U.S.C. § 6a (2009) (amending the Sherman Act, 15 U.S.C. §§ 1–7). The FTAIA "clarifies that U.S. antitrust laws concern the protection of American consumers and American exporters, not foreign consumers or producers." *In re* Dynamic Random Access Memory Antitrust Litig. ("*DRAM*"), 546 F.3d 981, 984 (9th Cir. 2008) (internal quotations and authorities omitted). "The FTAIA amends the Sherman Act and excludes from [its] reach much anti-competitive conduct that causes only foreign injury." *Id.* at 985 (internal quotations and Supreme Court authority omitted). The court in *DRAM* explicitly recognized that the issue of subject-matter jurisdiction may sometimes become tangled with a failure to have stated a claim. *Id.* at 985 n.3. The court avoided having to untangle the issues because "the result and analysis are the same" however the question was answered. *Id.*

In F. Hoffman-LaRoche Ltd. v. Empagran, S.A. ("*Empagran I*"), 542 U.S. 155, 159 (2004), the Supreme Court made clear that foreigners could bring claims under the Sherman Act [the principal federal antitrust provision] only "where [their] claim rests *solely* on the independent foreign harm" (emphasis supplied). Independent does not mean that "foreign plaintiffs injured by a conspiracy that also injured American purchasers could not sue under the Sherman Act." *DRAM*, 546 F.3d at 986 n.7 (internal quotations and authorities omitted). Requiring independent proximate cause "is consistent with principles of comity—the respect sovereign nations afford each other by limiting the reach of their laws." *Id. at* 987 (internal quotations and citations omitted).

25. Restatement (Third) of Foreign Relations Law consists of international law as it applies to the U.S., and domestic law that has impact on the foreign relations of the U.S. or has other in significant international consequences. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1); *see also Empagran I*, 542 U.S. at 164 ("prescriptive jurisdiction" referring to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW).

26. 509 U.S. 764, 796–98 n. 22 (1993).

27. *In re* Parmalat Sec. Litig., 497 F. Supp. 2d 526, 528-29 (S.D.N.Y. 2007) (citing Arbaugh v. Y&H Corp., 546 U.S. 500, 502 (2006)).

the Court, Justice Scalia immediately addressed and decided what the opinion called the "threshold error" of considering "the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction."[28] Asking what "conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question," not whether the tribunal has "power to hear a case," which would be a jurisdictional query.[29] In so answering, Justice Scalia gave § 10(b) an extraordinary long reach in some circumstances, as the necessary import of a decision that places any security listed on domestic exchanges under the domain of § 10(b) is that the United States, acting through securities laws, has the power to prescribe consequences to a foreign issuer. This power would presumably apply with equal force if the issuer's only ongoing contact with the United States is by the listing of its ADRs on domestic exchanges. At II.C below, we examine the correspondence between this unequivocal authority and the Court's expressed concerns about the comity implications of allowing § 10(b) to reach transactions on a foreign exchange.

C. ANALYSIS OF *MORRISON*

Holding that the issue before the Court implicated only statutory interpretation, the Court turned to whether § 10(b) indeed enjoyed extraterritorial reach.[30] The Court began its work on the merits of the *Morrison* controversy by rehearsal of the noncontroversial principle that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[31] The Court added that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[32] Here, the Court looked initially for precedent,

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28. *Morrison*, 130 S. Ct. at 2876–77.

29. *Id.*

30. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402. "[T]he jurisdiction of the United States to prescribe is governed by the Constitution, and is limited by the Bill of Rights." *Id.* at cmt. j. In *Int'l. Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945), the Supreme Court held that due process requires that a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The due process test therefore has two parts: the "minimum contacts" inquiry and the "reasonableness" inquiry. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996).

Where the claim arises out of the defendant's contacts with the forum, minimum contacts exist where the defendant "'purposefully availed' itself of the privilege of doing business in the forum and could foresee being 'haled into court' there." *See* Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)), where specific jurisdiction exists when a defendant has "'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those injuries.").

31. *Morrison*, 130 S. Ct. at 2877.

32. *Id.* at 2878.

not to a decision involving the securities laws at all, but of the reach of Title VII, American civil rights legislation, *EEOC v. Arabian Am. Oil Co* ("*Aramco*").[33] The essential *Aramco* issue was whether Title VII's protection extended to United States citizens employed abroad.[34] Justice Scalia's use of that decision is discussed below. This was prelude to the majority's observation that, before *Morrison*, decisions interpreting the extraterritorial reach of the Exchange Act had awarded themselves wide interpretive authority because, in their view, the Act was "silent as to the extra territorial application of §10(b)."[35] Justice Scalia surveyed the case law that had been developing over four decades, summarizing, accurately, that whether the Exchange Act applied transnationally had involved case by case inquiries depending ultimately on significant *conduct* in the United States and some *effect* on American securities[36] or more recently an admix of conduct and effects.[37] The Court observed, undeniably in this instance, that where as here courts felt authorized to "discern" what Congress would have written had it thought about the topic, the resulting decisions had become "complex in formulation and unpredictable in application."[38]

The Court next examined the text of the Exchange Act for what it revealed about its extraterritorial application. The concurrence[39] acidly characterized this part of the decision as "Justice Scalia's personal view of statutory interpretation."[40] That personal view treated the Act's definition of "interstate commerce," a term also appearing in § 10(b), as including activity "between any foreign country and any State,"[41] as the sort of "general reference" that the decision in *Aramco* had given permission to disregard.[42] Justice Scalia similarly diminished the part of the Exchange Act's statement of purposes that "prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries" as not intended to connect America's national

33. 499 U.S. 244 (1991).

34. *Cf.*, in *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982), the plaintiff had claimed that it had been "treatied-out" from application of Title VII. The Court disagreed. It held that the domestic subsidiary of a Japanese company was not exempt from Title VII's employment discrimination laws.

35. 130 S. Ct. at 2878.

36. *See* discussion *infra* Part IV.C.

37. 130 S. Ct. at 2877, *et seq.*

38. *Id.* at 2878. The right of Americans to use § 10(b) purchasing abroad shares of a foreign issuer listed both on United States and foreign exchanges was constant. *See* discussion, *supra* note 6.

39. *Id.* at 2892. Never was a "concurrence" more misnomered than Justice Stevens's. It concurred in the conclusion that §10(b) did not extend to the particular facts of the matter, but vehemently dissented from the holding.

40. *Id.*

41. *Id.* at 2882 (citing 15 U.S.C. § 78c(a)(17))

42. *See* discussion, *supra* note 25.

public interest to activities in foreign exchanges and markets.[43] Demoting the Act's allusion to foreign countries to a "fleeting reference," the Court concluded that the reference could not overcome the general presumption against extraterritorial application, and that § 10(b) could not therefore reach purchases of securities listed on foreign exchanges.[44]

Over several pages the Court next wrestled with § 30(b) of the Exchange Act.[45] That section specifically mentions the Act's extraterritorial application,[46] and expressly provides the SEC with the power to regulate "to prevent evasion of [the Act],"[47] power that the SEC does not appear to have exercised with respect to that section. The Court confined § 30's reference to extraterritorial application to § 30, insisting that the language was not intended to apply Act wide—"why would the Commission's enabling regulations be limited to those preventing 'evasion' of the Act, rather than all those preventing 'violation.'"[48] The Court went on to pronounce that § 30(a) represented the "clear statement of extraterritorial application" that § 10(b) lacks,[49] and that the specificity in § 30(a) "would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges."[50]

Justice Scalia finished up the majority's work with an array of miscellaneous arguments, many to refute those of the concurring opinion. Noting that Congress had reversed by legislation the Supreme Court's rejection in *Aramco* of Title VII's extraterritorial application, the Court declared that, "[T]his shows [] that Congress knows how to give a statute explicit extraterritorial effect."[51] Next, by repeating that text controls and all that matters from the point of view of § 10(b) text are "purchases and sales of securities in the United States," the Court gave little if any weight to the domestic consequence of excusing from § 10(b) foreign transactions in securities traded both on foreign and domestic efficient markets.[52] The Court stated, "it is our view only transactions in securities listed on

43. 130 S. Ct. at 2882 (citing 15 U.S.C. § 78b(2)).

44. 130 S. Ct. at 2885 n.10.

45. 15 U.S.C. § 78dd(b).

46. *See* discussion, *infra* § 30.

47. 130 S. Ct. at 2882.

48. *Id.* This seems a paradigmatic distinction without a meaningful substantive difference, as in the end to implicate § 10(b) any evasion must be a violation in order.

49. "Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect. Its explicit provision for a special extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative. Even if that were not true, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* at 2883.

50. *Id.*

51. *Id.* at 2883 n. 8.

52. *Id.* at 2884.

domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."[53] The Court expressed the belief that, if Congress had intended § 10(b) to apply internationally, as plaintiff urged, that law would have conflicted with laws of other nations, and therefore lawmakers would have been explicit about their geographic intentions.[54]

Finally, the majority addressed the SEC submissions to the Supreme Court. In them, the SEC had made known that in its view a "'significant and material conduct' test" aligned with contemporary notions of comity, and recommended that § 10(b) should apply where "the fraud involves significant conduct in the United States that is material to the fraud's success."[55] The Court ignored the SEC on comity, and denied *Chevron* deference[56] to the SEC because, *inter alia*, the agency relied on decisions by courts rather than provide its own statutory interpretation.[57]

The Court rejected the position advanced by the SEC for the additional reason that, in the Court's view, there was no textual support for it. The Court thus diminished to nought the authority of citations by the SEC to other instances where domestic conduct with consequences abroad had been regarded as within a statute's scope notwithstanding that United States law had not specifically conferred that authority.[58] The Court distinguished decisions extending the Lanham Act[59] extraterritorially because that Act defines commerce as "all commerce which may lawfully be regulated by Congress," and the Exchange Act does not.[60]

In *dicta* that likely revealed how the majority came to decide as it did, the Court stated that it surely wished to avoid any result that would transform United States courts into a "Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities

53. 130 S. Ct. at 2884.

54. *Id.*

55. *Id.* at 2886 (citing Brief for the United States as Amicus Curiae Supporting Respondents, 08-1191, 2010 WL 719337, at *16 (Feb. 26, 2010)).

56. *See infra* note 103.

57. 130 S. Ct. at 2887.

58. *Id.* at 2887 n. 11.

59. The Lanham Trademark Act, 15 U.S.C. §§ 1051–1127, houses, but not exclusively, federal statutes concerning trademark law. Unstated was that the Lanham Act has a section (1127) dedicated to "[c]onstruction and definitions; intent of chapter." The Exchange Act has a definitions section, but otherwise does not have a section corresponding to that of the Lanham Act. What the Exchange Act does have, *inter alia*, is a section headed "Necessity for regulation," and that section both states that national public interest requires that securities transactions "as commonly conducted upon securities exchanges" be regulated and controlled, and recognizes that such transactions "in large part originate outside the States"; and that the prices established "are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are [traded]." 15 U.S.C. § 78b.

60. 130 S. Ct. at 2887 n. 11 (citing *Aramco*, 499 U.S. at 252).

markets."[61] An earlier Supreme Court had regarded private actions as a "necessary supplement" to the enforcement activities of the SEC.[62]

III. THE *MORRISON* DECISION, AN EVALUATION

A. DISCERNING COURTS LEAD TO CONFUSING LAW

The Securities Exchange Act of 1934 came into being in response to the Great Crash of 1929. The Act governs the secondary trading of securities (stocks, bonds, and the like) following their registration and initial public offerings, and "[t]he antifraud provisions of the securities laws have been held to reach beyond the registration requirements of the 1933 Act."[63] The distinction is drawn from the different language of the laws, and the view that 1933 Act registration requirements are more likely to be peculiar to the United States than the Exchange Act's anti-fraud measures, and accordingly the 1933 Act registration requirements would be the more invasive of another country's internal business affairs. By contrast, it is felt—perhaps naively—and has been expressed, that the capital world universally abhors fraud.[64] So, "[w]hile registration requirements [of the variety demanded by the 1933 Act] may widely vary, anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged."[65]

By the 1970s, securities transactions increasingly crossed national borders, and the American class action device provided a mechanism to redress fraud in connection with those transactions. It was not long before courts were being asked whether § 10(b) applied to securities of foreign issuers that had been acquired abroad by foreigners (the so-called "F-cubed" investor). In 1975, the question was put to the Second Circuit Court of Appeals in a panel of judges led by the highly respected Chief Judge Friendly.[66] That case was *Bersch v. Drexel Firestone, Inc.*,[67] which

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61. 130 S. Ct. at 2886. The decision as a whole remarkably unaware of the kinds of transnational activities that do occur, and that some times do in fact allow activities in one nation to allow fraud to infiltrate securities exchanges across the globe. Consider the facts of *SCOR*, 537 F. Supp. 2d 556, discussed *supra* note 6.

62. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 382 (1970).

63. Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London ("*EOC*"), 147 F.3d 118, 127 (2d Cir. 1998); Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77a, *et seq.* (2009).

64. *See* Morrison v. National Australia Bank, Ltd. ("*National Australia Bank*"), 547 F.3d 167, 174–75 (2d Cir. 2008) (where the second circuit engaged in mini-survey).

65. *Id.* at 175. This rationale would seemingly translate to a good neighbor founded on mutual enforcement of any malefactor who has transacted business in one's forum.

66. Judge Henry J. Friendly (1903-1986), United States Court of Appeals for the Second Circuit, 1959 through 1974, Chief Judge, 1971 to 1973. *See Friendly, Henry Jacob*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=802&cid=999&ctype=na&instate=na (last visited Feb. 10, 2011).

immediately became the touchstone for thirty-five years of jurisprudence concerning § 10(b)'s extra-national reach.

Bersch held that "merely preparatory activities in the United States [that concluded with the fraud complained of] are not enough to trigger application of the securities laws for injury to foreigners located abroad . . . ."[68] In formulating that standard, the court in *Bersch* freely admitted that it could not "point to language in the statutes, or even in the legislative history,"[69] hypothesizing instead that, in enacting the securities laws during the 1930's, Congress "could hardly have been expected to foresee the development of off-shore funds thirty years later."[70] The court's "legislative" authority itself claimed ancient provenance, *Heydon's Case*,[71] as source of it fanciful powers of legislative interpretation. *Heydon's Case* states:

> The true reason of the remedy: and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the Act, *pro bono publico*.[72]

Although Judge Friendly believed that the court was obliged to operate in the arena of surmise, the test that the court developed was not wholly invented. Rather, as discussed above, once peeled of the "conduct and effects test" label, the process bore resemblance to that employed by courts seeking to identify whether a forum had "minimum contacts" of various kinds sufficient to obtain personal jurisdiction. Whether a matter fell on one side or the other of the jurisdictional line generally involved case by case work, work that has been done in thousands of cases in a wide array of law applications, an activity consistent with how the law commonly develops. And so while *Bersch* authorized itself and its many successors, to interpret what Congress's intentions "would be"; that is, what they would have been had Congress thought about the possibility of

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67. *Bersch*, 519 F.2d 974 (2d Cir. 1975).

68. *Id.* at 992.

69. *Id.* at 993.

70. *Id.*

71. 3 Coke 7a, 76 E.R. 637 (1584). The principle of *Heydon's Case* may have been sterilized to fit the decision in *Bersch*. Moreover, *Heydon's Case* was not decided in a governmental environment that sought to maintain a firm partition between the legislative and judicial branches. And what if there is nothing to construe and no statutory intent regarding the subject matter brought to court? What if what the law, here §10(b), actually says collides with the court's construction?

72. *Id.* at 638–39. To similar end, Justice Cardozo (1870-1938), U.S. Supreme Court justice 1932 to 1938, urged courts to assume the duty "to make more profound the discovery of the latent meaning of positive law." BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 15 (Yale University Press 1964) (1921) [hereinafter THE NATURE OF THE JUDICIAL PROCESS].

having intentions, much less actually had them, the license was intended to operate within a familiar judicial methodology.

In the event,[73] the *Bersch* claim that "the SEC has provided no such guidance [respecting the extra-national reach] for the anti-fraud provisions of the 1934 Act, leaving the courts to decide the application of § 10(b) with reference to the statute and its purpose and history" was not entirely accurate.[74] The Exchange Act as a whole shows awareness of a financial world beyond the borders of the United States in a way that makes clear that Congress did consider transnational financial activity, and was not necessarily adverse to transnational application of that Act.

Repudiating decades of law, out of which had developed the principle that the international reach of the Exchange Act's § 10(b), would depend upon significant domestic misconduct and its effect on domestic investors—as well as a showing that the misconduct caused the foreign investors claimed losses. The Court insisted that, where courts gave themselves license to "discern" what Congress would have legislated had they thought about it, results become "complex in formulation and unpredictable in application."[75] Here, the majority opinion cannot be gainsaid.[76] Judicial analyses developed in this area have confused, if not actually degraded, legal principles in order to arrive at desired, but not necessarily desirable, outcomes respecting access to United States courts and availability of § 10(b) to foreigners who purchased a foreign issuer's shares on a foreign exchange—the F-cubed plaintiff.[77]

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73. *EOC*, 147 F.3d 118.

74. *Id.* at 128 n. 11. The concept of legislative silence continued into *Morrison* briefs filed with the Supreme Court. "The text of the Exchange Act is silent as to its transnational reach." Brief for the United States as Amicus Curiae Supporting Respondents, Morrison, 130 S. Ct. 2869 (No. 08-1191), 2009 WL 3460235, at *6 (citing *Itoba*, 54 F.3d at 121).

75. Morrison, 130 S. Ct. at 2878.

76. "When a court declares that a certain interpretation will lead to undesirable consequences and is therefore to be avoided, the striking quality of this declaration is usually the grave doubt it elicits as to the accuracy of the forecast." Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 878 (1929–30).

Decades before Judge Friendly enabled courts to read the minds of Congress regarding a subject about which it allegedly never had in mind, Professor Harry W. Jones (1911-1993), Cardozo Professor emeritus at Columbia University Law School, advocated this very kind of judicial activity. Where "[t]he thought of the members of the legislature, or any of them, may never have been directed, even in the most general outline, to the essential interpretative issue of a case at bar . . . judges must frequently act legislatively in determining the legal effect to be given to a statute. . . . [In so doing], [t]he phrase 'legislative intention' may be taken to signify the teleological concept of legislative *purpose*, as well as the more immediate concept of legislative *meaning*." Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 972 (1940) (emphasis in original).

77. "The fact is," said Gray in his lectures on *The Nature and Sources of the Law*, "that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." JOHN CHIPMAN

More particularly, since 1975, *Bersch*'s "conduct and effects" test that wants more than "merely preparatory" conduct in the United States that cannot be "relatively small to those abroad" had degraded into something of a farrago that variously has been described as "substantial acts in furtherance of";[78] "causes, or plays a substantial part in causing, harm" to F-cubed plaintiffs;[79] United States activities that are the source and focus of the fraud cannot satisfy "conduct" because they are merely the object of the fraud;[80] fraud on the market theory[81] may not be used to show injuries to F-cubed class plaintiffs;[82] one looks to where the fraudulent statements emanate, *unless* the mastermind was in the United States, *unless* perhaps the mastermind's final fraudulent thoughts occurred outside the United States.[83] And sometimes what really matters is "what conduct comprises the heart of the alleged fraud."[84] Cases routinely had allowed U.S. investors to proceed while closing courthouse doors to the F-cubed investor, that is, the foreigner purchasing a foreign issuer's securities on a foreign exchange. Assuming the defendant had shares or ADR equivalents available for sale in the United States, courts had been finding subject matter jurisdiction over class claims by U.S. residents purchasing abroad even while rejecting those by foreigners.

GRAY LL.D., THE NATURE AND SOURCES OF THE LAW 165 (1909); THE NATURE OF THE JUDICIAL PROCESS, *supra* note 56, at 15 (internal quotations and citations omitted).

78. Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041, 1045 (2d Cir. 1983).

79. *EOC*, 147 F.3d at 128.

80. *Rhodia*, 531 F. Supp. 2d at 539–40 ("The activities in the United States were 'merely a link in the chain of the overall scheme . . . engineered by foreign corporations on foreign soil").

81. Teamsters Local 445 Freight Div. Pension, Fund v. Bombardier Inc., 546 F.3d 196, 199–200 n.4 (2d Cir. 2008) ("The *Basic Inc. v. Levinson* [485 U.S. 224 (1988)] fraud-on-the-market theory involves two rebuttable presumptions that permit a finding of class-wide reliance with respect to a Rule 10b-5 claim: 'that (1) misrepresentations by an issuer affect the price of securities traded in the open market, and (2) investors rely on the market price of securities as an accurate measure of their intrinsic value.' Hevesi v. Citigroup Inc., 366 F.3d 70, 77 (2d Cir. 2004). It is 'based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business' and that '[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.' *Basic*, 485 U.S. at 241–242, 108 S. Ct. 978. The theory is premised on the existence of an informationally efficient market, in which 'market professionals generally consider most publicly announced material statements about companies, thereby affecting stock prices.' *Id.* at 246 n.24, 108 S.Ct. 978.").

82. *In re* Bayer AG Sec. Litig. (*Bayer II*), 423 F. Supp. 2d 105 n. 2 (S.D.N.Y. 2005) ("In light of this Court's conclusion that Plaintiffs have not established the conduct necessary to extend subject matter jurisdiction over the Foreign Purchasers, the Court declines to engage in a purely advisory discussion of Plaintiffs' fraud on the market theory. This Court notes, however, as it did in *Bayer I* [*In re Bayer AG Sec. Litigation* (*Bayer I*), No. 03 Civ. 1546 WHP, 2004 WL 2190357, at *18 (S.D.N.Y. Sept. 30, 2004)], that when considered by other district courts, this theory has been rejected.").

83. *See Bayer II*, 423 F. Supp. 2d at 111; *SCOR*, 537 F. Supp. 2d at 564-65 (S.D.N.Y. 2008); *Berger*, 322 F.3d at 193.

84. *National Australia Bank*, 547 F.3d at 175.

Where the aggrieved plaintiff happened to have been an F-cubed foreign investor purchasing a foreign issuer's securities on a foreign exchange, courts had precluded the F-cubed plaintiff from using "effects" alone to establish jurisdiction, that "effects" as a basis upon which to justify jurisdiction was available only to United States citizens. "[T]he effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges."[85] Accordingly, the effects test "cannot be satisfied by foreign plaintiffs who are foreign investors who purchased shares of [ ] a foreign corporation, on a foreign exchange. . . . The 'effects test' is only meant to shield domestic investors and domestic markets from the effects of securities frauds perpetrated elsewhere."[86] Courts generally had decided not relevant, or at least not paramount, in determining subject matter jurisdiction that a foreign scheme had adverse "generalized effects" on United States financial markets.[87]

Perhaps, though, class actions represent instances where the "conduct and effects test" had been most artificially employed. In *Bayer II* the court denied class certification on the ground that "only eight percent of Bayer AG's shares" were traded in the United States, too little, in the court's view, to obtain jurisdiction over the foreign issuer—"a very small tail may be wagging an elephant" was how the court put it.[88] Omitted was that the tail weighed in at approximately $2 billion of Bayer market capitalization.[89] The court in *Royal Dutch* expressly wrote that "class actions may require different treatment."[90]

Against this background, one can readily see how the Court in *Morrison* concluded that the "conducts and effects test" has become complex and unpredictable. Yet, in the 35 years of its articulation, modification, and application by numerous appellate and other courts, neither the SEC nor Congress had acted as if they had seen a need to do away with the premise of the Friendly-*Bersch* standard, *viz.*, § 10(b) may reach beyond domestic borders under certain principled conditions. Moreover, by couching "conducts and effects test" as jurisdictional, *Bersch* created a tool sufficiently flexible to protect investors without hauling before American courts foreign issuers having only exiguous contacts. Tellingly, when the Supreme Court in *Morrison* called upon the SEC's

85. *EOC*, 147 F.3d at 128. This does not quite seem accurate. Given that foreign plaintiffs also must show that the conduct caused their injuries abroad, their claims too are subject to an "effects test."

86. *Rhodia*, 531 F. Supp. 2d at 538. To be precise, while correct that F-cubed plaintiffs cannot avail of the effects test for subject matter jurisdiction purposes, it was available to American investors who had purchased abroad so long as domestic markets were affected. *Bersch*, 519 F.2d at 993.

87. 519 F.2d at 987–89.

88. *Bayer II*, 423 F. Supp. 2d at 110–13.

89. *See* BAYER GROUP, 2005 ANNUAL REPORT 69 (2006) ("Market capitalization at year end . . . €25.8 billion [US $21.67 billion]"), *available at* http://www.investor.bayer.com/user_upload/485/.

90. *In re* Royal Dutch/Shell Transport Sec. Litig., 522 F. Supp. 2d at 718.

views regarding § 10(b)'s extra-national extension, the SEC neither sought to dispense with the "conduct and effects test," nor otherwise maintained that § 10(b) entirely lacked international reach. Rather, the SEC sought only to make uniform the standard for measuring (mis)conduct—§ 10(b) should apply where "the fraud involves significant conduct in the United States that is material to the fraud's success."[91]

B. "JUSTICE SCALIA'S PERSONAL VIEW OF STATUTORY INTERPRETATION"

That was how Justice Stevens put it, and if by that he meant that Justice Scalia imposed an idiosyncratic gloss on the text of the Exchange Act, Justice Stevens seems correct.

1. Section 10(b)

As laid out above, the Court repudiated decades of recognition that § 10(b) did have an extraterritorial aspect. The Court did so following numerous pages stuffed with policy. The Court used the history of unpredictable application of the "conduct and effects" test to conclude that the criticisms of the test that the Court had gathered "seems to us justified." So far so good. But then, in a self-indulgent *non sequitor*, Justice Scalia insisted that the criticisms *per* force "demonstrate the wisdom of the presumption against extraterritoriality."[92] To be sure, the criticisms may have invited, perhaps necessitated, clarity or sharpening of standard, as the SEC had urged, but it certainly did not oblige a presumption against extraterritoriality. Regardless, the Court then sought to explain how § 10(b)'s text did not defeat that presumption.

The Court acknowledged that "interstate commerce" used in § 10(b), and defined by the Act, includes the use of an "interstate instrumentality" between "any foreign country and any State."[93] Overlay the definition of "interstate commerce" onto § 10(b), and the law reads, "it shall be unlawful for any person, directly or indirectly, by the use of any means of instrumentality of any *foreign country* . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities

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91. *Morrison*, 130 S. Ct. at 2886, citing Brief for the United States as Amicus Curiae Supporting Respondents, 2009 WL 3460235, at *16. That the standard would require case by case application to particular facts is a commonplace in respect of § 10(b) litigation, and generally in a country whose laws evolve case by case, rather than by application of a rigid Napoleonic Code. Perhaps, though, the nation's laws may be moving to the Jesuitical style argument where characterizing a lie as an "economy of truth" would be lauded formulation.

92. *Morrison*, 130 S. Ct. at 2881.

93. *Id.* at 2882; 15 U.S.C. § 78c(a)(17) ("State" meaning any one of the United States (15 U.S.C. § 78c(a)(16)).

exchange . . . any manipulative or deceptive device," etc., a transaction consistent with a clear rebuttal of the presumption against extraterritoriality.[94] Consistently, for decades, the SEC had regarded the definitional reference to "foreign country" as "statutory language that reflects Congress' belief that the remedial purposes of the securities laws could not be realized if jurisdiction, particularly as to the antifraud provisions, were limited to wholly domestic transaction."[95]

To avoid the force of this interpretation, Justice Scalia decided to regard as key the phrase "in connection with," decreeing that the defined reference to "foreign country" does not work to defeat the presumption against extraterritorial application.[96] By placing the greatest emphasis on the phrase "in connection with," Justice Scalia limited § 10(b) to transactions on national exchanges. By using "in connection with" to limit § 10(b) to "a national securities exchange," the court ignored decades of judicially expansive interpretations of "in connection with," most famously expressed in *Sec. and Exch. Comm'n v. Texas Gulf Sulfur*, that courts should broadly construe the phrase "in connection with" the "purchase or sale of any security."[97] The mandate of broad construction had been taken to heart in a legion of authorities, including those where misrepresentations do not actually directly concern securities being traded[98] and treatises.[99] By narrowing § 10(b) to purchases of securities listed on domestic exchanges,

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94. The Act does not limit "exchange" to domestic. 15 U.S.C. § 78c(a)(1) ("'[E]xchange' means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.").

95. Memorandum of the Securities and Exchange Commission, Amicus Curiae, IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980) (No. 79-7084), 1979 WL 200202 at *12. For illustrations of another agency brief advocating transnational reach of the securities laws, *see* Brief of the Securities and Exchange Commission as Amicus Curiae Supporting Plaintiff, Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118 (2d Cir. 1998) (No. 96-7900), 1997 WL 33489165, at *8, *et seq.*

96. *Morrison*, 130 S. Ct. at 2881–82.

97. 401 F.2d 833, 861 (2d Cir. 1968) (internal quotation marks and citation omitted), *cert. denied*, Coates v. Sec. and Exch. Comm'n., 394 U.S. 976 (1968).

98. 991 F.2d 953 (2d Cir. 1993).

99. *See, e.g.*, THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.5[1] (6th ed. 2005) (collecting a legion of authorities) [hereinafter HAZEN]. Hazen identifies a number of Supreme Court decisions broadly reading the "in connection with" requirement including *Carpenter v. United States*, 484 U.S. 19 (1987), the heart of which was merely a reporter's heads up to friends about an upcoming story; *Sec. and Exch. Comm'n v. Zandford*, which involved a broker's looting of client funds without regard to any specific securities transaction. The rationale was that § 10(b) had as a general purpose to encourage investor confidence by the assurance of honest markets. "Among Congress' objectives in passing the [Exchange] Act was to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929." 535 U.S. 813, 824–25 (2002) (internal quotation marks and citations omitted).

Morrison fails the longstanding mandate to encourage investor confidence in connection with the assurance of honest markets. Foreign venues simply do not have the protective force of § 10(b), certainly when used as a class action expression.

There is no question that the inability of United States courts to entertain aggregate claims by foreign investors will diminish the deterrence authority of the federal securities laws. The defendants' law firm Sullivan & Cromwell LLP[100] said as much in a 2009 firm publication.[101] Commenting on the dual-events of a $352.6-million settlement of a Royal Dutch/Shell class action made in the Netherlands contingent on a refusal by United States courts to certify a class that included F-cubed plaintiffs, the firm expressed the belief that the shrinkage of class sizes occasioned by exclusions of foreign investors may well "diminish the incentive for U.S. plaintiffs' lawyers to bring class action suits on behalf of U.S. investors alone . the few European statutes that might allow investors to bring securities fraud claims as a class are narrow and largely unproven."[102]

The Court then turned to purposes provisions, i.e., the Exchange Act's statement of the law's necessity,[103] and as mentioned, characterized as "fleeting," the reference to foreign countries in connection with the law's necessity because the "prices established and offered in such transactions [in securities as commonly conducted on exchanges] are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold . . . ."[104] It hardly requires perception to note that, what the Court regarded as "fleeting," the financial world regards as a necessary commonplace. Possibly in anticipation of this rebuke, the Court added that, "nothing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges."[105] Nothing? The Court

100. Sullivan & Cromwell LLP is an international law firm with headquarters in New York that focuses on advising companies on mergers and acquisitions and on corporate law for industrial, commercial, and financial clients, more than half of which are located abroad. *See About S&C*, SULLIVAN & CROMWELL LLP, http://www.sullcrom.com/about/overview/ (last visited Feb. 11, 2011)..

101. SULLIVAN & CROMWELL LLP, DUTCH COURT APPROVES SETTLEMENT BETWEEN NON-U.S. ISSUER AND 'CLASS' OF NON-U.S. CLAIMANTS (June 12, 2009), *available at* http://www.sullcrom.com/files/Publication/78662d1d-43cf-4999-a836-158cffe3c83c/Presentation/PublicationAttachment/04385e24-b80d-4ab7-bbfe-18601cf50767/SC_Publication_Dutch_Court_Approves_Settlement_Between_Non-U.S._Issuer_and_%e2%80%9cClass%e2%80%9d_of_Non-U.S.pdf [hereinafter DUTCH COURT APPROVES].

102. DUTCH COURT APPROVES, *supra* note 81, at 3–4. *See also* John J. Clarke, Jr., Keara M. Gordon, *Global Realm of Securities Class Actions; As U.S. courts grapple with jurisdiction over foreign investors' claims, other countries adopt elements similar to American model*, N.Y. L.J., May 19, 2008, at p. S4, col. 3.

103. 15 U.S.C. § 78b.

104. *Morrison*, 130 S. Ct. at 2893 n.9 (citing 15 U.S.C. § 78b(2)).

105. *Id.* at 2882.

itself just noted how the statute recognizes that established prices are equally disseminated and quoted globally. And for many decades, the SEC recognized that narrow interpretations of these securities laws "could have a significant adverse impact on the enforcement of the antifraud provisions. These potential adverse consequences are of particular concern to the Commission in light of the increasingly international character of securities transactions and securities frauds."[106]

Lawmakers' recognition of the need to extend § 10(b) to foreign countries because they influence the prices at which securities are transacted both at home and abroad is manifestly consistent with the developed and now discarded "conduct and effects test," and clearly rebuts the Court's assertion that "nothing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets." The language of the statute *per* force recognizes that a pollutant of prices on one exchange contaminates the other, and a statute that cannot reach one cannot prevent contamination of the other. The statutory text coupled to a secular understanding of how markets operate clearly rebuts any claim of § 10(b) parochialism, the more so because the world's efficient securities markets have grown increasingly entwined since 1934, and with it the need for laws that recognize the uniform influences upon foreign and domestic share prices. The Court should not have relegated these irrefutable realities to the "fleeting" bin.

2. *Section 30*

The Court then addressed the explicit references to "foreign" in § 30 of the Exchange Act,[107] headlined *Foreign Securities Exchanges*. Section 30(b) provides that the Act:

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106. Memorandum of the Securities and Exchange Commission, Amicus Curiae, IIT v. Cornfeld, 619 F.2d 909 (1980) (No. 79-7084), 1979 WL 200202, at *1.

107. 15 U.S.C. § 78dd(b) (2009). Section 30 of the Exchange Act, 15 U.S.C. § 78dd, enacted 1934, addresses the degree to which the Exchange Act applies to transactions through foreign exchanges.

> Foreign Securities Exchanges
>
> Sec. 30. (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this Act.
>
> (b) The provisions of this Act or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this Act.

> or any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.[108]

Although the section *specifically* refers to the entire "Act and any rule or regulation thereunder," the Court limited the section's reference to "without" United States activities to § 30, adding for benefit of its textual analysis that § 30's references to foreign application possesses the explicit quality that § 10(b) lacks.[109] Allowing full merit to the Court's analytic method, its conclusion gets matters backward. What § 30(b) did make explicit was that its terms "shall *not* apply . . . without the jurisdiction of the United States," *unless* in violation of an SEC rule.[110] Section 10(b) has no like limitation, and, again, § 30 states its provision applied Act wide. As the SEC had once put it, "since Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit this exemption, *the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted.*"[111] So, if the true inference were honestly to be drawn from the scrutinized § 30 language, it would have to be that its framers intended the Act to apply *without* the United States domestic jurisdiction *unless* its language explicitly says it shall not.[112]

Section 30 thus shows, clearly, that: (a) Congress knew how to place restrictions on the scope of the law, and that it knew how to make those restrictions explicit when it wanted to; (b) set limitations on its reach when it wanted to; and (c) seemingly presumed a reach that would capture transactions without the United States intended to evade the law or SEC regulation.[113] It is no surprise that the Exchange Act contains provisions that reveal that Congress had been conscious of the world of international finance—after all, issues of reparations and tariffs had been hotly debated and in many ways dominated the international economic and political stage since the conclusion of the First World War.

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108. 15 U.S.C. § 78dd(b) (emphasis added).

109. *Morrison*, 130 S. Ct. at 2883.

110. 15 U.S.C. § 78dd(b) (emphasis added).

111. Memorandum of the Securities and Exchange Commission, Amicus Curiae, IIT v. Cornfeld, 619 F.2d 909 (1980) (No. 79-7084), 1979 WL 200202, at *13 (quoting Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968) (emphasis supplied), *rev'd in part on other grounds*, 405 F.2d 215 (1968) (*en banc*), *cert. denied sub nom* Manley v. Schoenbaum, 395 U.S. 906 (1969)).

112. Of course, §10(b) was not designed to protect against "evasion" of the Act, but it remains redundant to have a law that proscribes evasion of another section of the same Act that already proscribes specified misconduct.

113. *Morrison*, 130 S. Ct. at 2882.

C. COMITY

Comity was Justice Scalia's next justification for proscribing § 10(b)'s extraterritorial application. "The probability of incompatibility with the applicable laws of other countries is so obvious," he wrote, "that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'"[114] In his concurrence, Justice Stevens helpfully reminds of recent Supreme Court decisions where the Court had stated, "[a]s a principle of general application . . . we have stated that courts should assume that legislators take account of the legitimate sovereign interests of other nations where they write American laws."[115] When he acknowledged the potential extraterritorial range of § 30,[116] Justice Scalia himself refuted his contention that, had Congress wanted foreign application, it would have addressed comity, which should have leant interpretive significance to the fact that § 30 has no Congressional statement regarding either conflict of laws, or comity. Justice Scalia carried on notwithstanding, "the regulation of other countries often differs from ours," citing discussions that almost entirely have to do with varying treatments of class actions, not with disagreement about fraud.[117]

The concerns expressed by Justice Scalia are ostensibly those typically of concern to comity; fundamentally, should one country's legal standards be imposed on another. This was an important consideration in the *Aramco* decision.[118] But substantive *leitmotif* in *Aramco* was whether America's civil rights were intended to travel abroad with American employees, a proposition that on its face seems an intrusive imposition of America's particular mores on another nation. By contrast, the *Sumitomo* decision involved a foreign entity *electing* to engage employees in the United States, and under the banner of a domestic subsidiary.[119] *Sumitomo's* fact pattern hardly raises the spectre of undue intrusion.

Against a backdrop of professed comity concerns, one might suppose the inquiry in respect of § 10(b)'s transnational extension and in *Morrison* should have been whether application of § 10(b) to transactions on foreign exchanges would be unduly intrusive or merely a predictable consequence of a foreign entity's election to have some shares listed on a domestic exchange or at least to transact a material part of its trade—as did National Australian Bank—in the United States through the malfeasant subsidiary,

114. *Morrison*, 130 S. Ct. at 2885 (citation omitted).
115. *Id.* at 2882 n.7 (internal quotation marks omitted).
116. *Id.* at 2882.
117. *Id.* at 2885.
118. *Aramco*, 499 U.S. at 265.
119. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982).

coupled to a contacts style analysis of the wrongdoer's fraud-related conduct in the United States. One could have expected genuine comity deliberations to have considered the ways in which the foreign entity elected to have a United States presence; for example, a process of this kind may have examined this excerpt from a foreign issuer's (name changed) recent presentation to the international financial community.

> XYZ COMPANY OVERVIEW
> - XYZ is an Australian oil and gas production company with all of its assets in the USA
> - The company is dual listed on the ASX and the NYSE AMEX
> - Trades as XYZ in both markets

Under traditional long-arm or comity considerations, a foreign enterprise that purposefully enters a jurisdiction both to solicit funds, to list its securities for trading, and then touts its business in order to enhance the value of these securities incurs the likelihood of finding itself falling personally under that forum's jurisdictional authority. Considered too would have been that potential F-cubed litigation invariably included trading in securities listed both abroad and on American exchanges, and for substantially alike reason substantially identical injuries to securities listed both on American exchanges and listed abroad.[120] Considered too would have been that the foreign issuer elected to take the steps necessary to have ADRs listed on domestic exchanges.[121] Surely the foreign power that hosts that enterprise could hardly claim intrusion where its enterprise elected to have all its assets in the United States, elected to "dual list" its securities, and elected to pitch internationally.

Consider too that nothing in the decision in *Morrison* universally immunized foreign issuers from liability for evasion or even violations of § 10(b). To the contrary, *Morrison* expressly authorized purchasers, foreign or domestic, of securities listed on American exchanges to act under that law against issuers, foreign or domestic. This left the SEC with power to pursue criminal penalties against a foreign issuer for fraudulent misrepresentations on foreign soil that artificially enhanced the value of

120. Prior to *Morrison*, cases had begun to appreciate that, so long as a foreign market was "efficient", material news introduced into it would have a highly correlated response to information introduced on domestic exchanges. *See, e.g., Marconi*, 225 F. Supp. 2d at 578–79 (court does not reject concept that shares trade in tandem on United States and London exchanges); *Alstom*, 253 F.R.D. at 280–82. Given that United States investors had been able to sue under §10(b) for purchases on foreign exchanges, that fraud-on-the market theorem applies to efficient foreign markets appears a necessary inference. *See* explanation, *infra* note 171 (fraud-on-the-market theory).

121. *See supra* note 1.

securities listed on American exchanges.[122] Prior to *Morrison*, courts applied § 10(b) overseas only after satisfaction of a modified "minimum contacts" examination d/b/a "conduct and effects test." For its part, the SEC appears to have been highly mindful of the form of misconduct and injurious effects as condition of actions that it brought against foreign persons, sometimes solely on account of securities acquired abroad or even acquired abroad by foreigners.[123] Post-*Morrison*, anyone who purchases a foreign issuer's shares on a domestic exchange is licensed to bring that issuer into an American court solely on account of that transaction, and the

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122. The SEC actuates criminal enforcement of the securities laws, including § 10(b), by referral to the Department of Justice. *See, e.g.*, Securities Exchange Act § 32, 15 U.S.C. § 78ff (authorizes criminal penalties). *See also* Sec. and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1379 (D.C. Cir. 1980) (acknowledging the SEC's power to set in motion criminal proceedings).

123. *See* Sec. and Exch. Comm'n v. Berger, 322 F.3d 187 (2d Cir. 2003) (action against foreign/offshore investment fund allowed to proceed because fraudulent scheme was masterminded and executed in the U.S. and involved transactions on U.S. exchanges; criminal proceeding commenced and defendant pled guilty to securities fraud under Section 10(b) and Rule 10b-5); *see also* Brief of the Securities and Exchange Commission, Appellee, Sec. and Exch. Comm'n v. Berger, 322 F.3d 187 (2d Cir. 2003) (No. 01-6254), 2002 WL 32330573 (2d Cir. June 28, 2002); Sec. and Exch. Comm'n v. Banner Fund Int'l., 211 F.3d 602 (D.C. Cir. 2000) (action against principals of offshore unit investment trust alleging that defendants defrauded U.S. investors into purchasing unregistered securities); Brief of the Securities and Exchange Commission, Plaintiff-Appellee, Sec. and Exch. Comm'n v. Banner Fund Int'l., 211 F.3d 602 (D.C. Cir. 2000) (No. 98-5235), 1999 WL 34833600 (D.C. Cir. June 30, 1999); Sec. and Exch. Comm'n v. Kasser, 548 F.2d 109 (3d Cir. 1977) (action against U.S. citizens, a Canadian corporation and Delaware corporation, allowed to proceed although the sole victim was a Canadian development fund and the securities at issue were never traded in or even exposed to American markets or investors); Sec. and Exch. Comm'n v. United Fin. Group, Inc., 474 F.2d 354 (9th Cir. 1973) (action against U.S. company and foreign/offshore mutual funds for securities fraud where U.S. company sold shares in the offshore mutual funds to foreign and U.S. investors); Sec. and Exch. Comm'n v. Benger, No. 09 CV 676, 2009 WL 1851186 (N.D. Ill. June 29, 2009) (action against foreign and domestic individuals and corporations for defrauding foreign investors into purchasing Regulation S securities issued by companies incorporated or having administrative offices in the U.S.); Plaintiff United States Securities and Exchange Commission's Response in Opposition to Relief Defendants Motion to Dismiss Complaint for Lack of Subject Matter and Personal Jurisdiction Pursuant to Fed R. Civ. P. 12(b), Sec. and Exch. Comm'n v. Benger, 09 CV 676, 2009 WL 1501608 (N.D. Ill. April 2, 2009); Sec. and Exch. Comm'n v. Wolfson, No. 2:03CV914 DAK, 2003 WL 23356418 (D. Utah Dec. 10, 2003) (action against foreign and domestic corporations and individuals for defrauding foreign investors by deceiving them into believing that they were investing in small U.S. companies); Sec. and Exch. Comm'n v. Batterman, No. 00 Civ. 4835 (LAP), 2002 WL 31190171 (S.D.N.Y. Sept. 30, 2002) (action against foreign/offshore investment company and its principals alleging that the defendants defrauded U.S. investors into purchasing the foreign company's unregistered securities); Sec. and Exch. Comm'n v. Dowdell, No. CIV. A. 3:01CV00116, 2002 WL 424595 (W.D. Va. Mar. 14, 2002) (action against foreign corporation and individual defendants alleging that they took part in a Ponzi scheme, defrauding foreign and U.S. investors into purchasing debenture instruments issued by the corporation); *Sec. and Exch. Comm'n v. Princeton Economic Int'l. Ltd.*, 84 F. Supp. 2d 452 (S.D.N.Y. 2000) (action against U.S. company and its foreign subsidiaries for selling fraudulent promissory notes to foreign institutional investors); Sec. and Exch. Comm'n v. Vesco, 548 F. Supp. 1270 (S.D.N.Y. 1981) (action against foreign corporations and shell corporations largely operated by one U.S. corporation for defrauding foreign and domestic purchasers of securities traded both in the U.S. markets and abroad).

SEC may do so seeking criminal penalties. *Morrison* may be said, therefore, to be less respectful of comity than was the predecessor doctrine, and to advance the anomalous position that Congress intended to have substantially the same conduct expose foreigners to criminal, but not civil consequences.

Pre-*Morrison* judicial analysis of the transnational extent of § 10(b) also seems to have paid more authentic heed to comity. American courts asked to grade conduct and effects tests had been mindful of comity,[124] and generally had concluded that, setting aside issues concerning foreign recognition of class judgments, concerns about conflicting laws and comity were likely overstated in instances of fraud. As noted above, it has been generally believed that the capital world abhors fraud.[125] "[W]hile registration requirements may widely vary, anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged."[126]

The "conducts and effects test" aligned with the conventional United States concept that a party's personal susceptibility to a forum (personal jurisdiction) will depend on the extent of the party's (minimum) contacts with a forum. Akin to "conduct and effects," "minimum contacts" is a fluid notion, meaning that the nonresident has "certain minimal contacts with [the forum] such that the maintenance of the suit does not offend

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124. *See, e.g., In re* Vivendi Universal, S.A., 242 F.R.D. 76, 96–107 (S.D.N.Y. 2007).

125. *National Australia Bank*, 547 F.3d at 174–75 (the court engages in mini-survey).

126. *Id.* at 175. This rationale would seemingly translate to a good neighbor founded on mutual enforcement of any malefactor who has transacted business in one's forum. *See* Brief of the Securities and Exchange Commission as Amicus Curiae, 547 F.3d 167 (2d Cir. 2008) (No. 07-0583-cv), 2008 WL 5485243 (citing *Empagran I*, 542 U.S. 155, 164; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416, note 3 (1987) ("In contrast to regulation under the antitrust laws, which not infrequently involved prohibition of conduct which another state favored or required, . . . United States securities regulation . . . has not resulted in state-to-state conflict.")).

"[P]arties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)). Although neither the "unilateral activity" of a plaintiff nor "random," "fortuitous" nor "attenuated" contacts by a defendant will support jurisdiction, jurisdiction over a defendant is proper where the defendant's contacts "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 474–75 (emphasis in original). In determining whether a defendant has "minimum contacts" with the forum state, as under the New York long-arm statute, courts may take into account the activities of a defendant's co-venturer or agent to determine whether the defendant had minimum contacts with the forum state. *See, e.g.*, Bonney v. Roelle, No. 96-1664, 1997 WL 407831, at **7–8 (4th Cir. 1997); Chrobak v. Hilton Int'l, No. 06 Civ. 1916 (MGC), 2008 WL 4444111, at *2 (S.D.N.Y. Sept. 30, 2008); Hill v. Shell Oil Co., 149 F. Supp. 2d 416, 418 (N.D. Ill. 2001) ("The joint venture . . . provides that the minimum contacts of one co-venturer are attributable to other co-venturers such that personal jurisdiction over one means personal jurisdiction over all."); Stewart v. Adidas A.G., No. 96 Civ. 6670, 1997 WL 218431, at **4–5 (S.D.N.Y. April 30, 1997).

traditional notions of fair play and substantial justice,"[127] and may be flexibly applied. Reaching beyond a particular forum often is determined by a local "long-arm statute." For commercial matters, these statutes ask that consideration be given to the extent to which the defendants has been doing or transacting business in the forum,[128] also at bottom merely another way of expressing minimum contacts.

Consistent with the view that the majority's comity concerns were inflated, and that the pre-*Morrison* conduct and effects analysis had more in common with customary judicial analysis, Restatement (Third) of Foreign Relations Law § 402(1)(c) declares that, subject to § 403, a state has jurisdiction to prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."[129] This language of course is little more than "conduct" and "effects" re-packaged in Restatement form, and comments to this section impose no additional restrictions on any free judicial hand that might happen to search within the Restatement for guidance. The Restatement

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127. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 413–14 (1984).

128. For extensive discussion and assembly of case authorities regarding doing business and transacting business, general and specific jurisdiction, *see* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL, ¶¶1069.2, 1069.3 (3d ed. 2005) [hereinafter FED. PRAC. & PROCEDURE]. Essentially, doing business refers to a continuous and systematic business activity in the forum, which would subject defendant to a claim for any cause. Transacting business concerns "an isolated but purposeful business transaction in [the forum] and the plaintiff's claim arises out of the particular transaction." McKinney's C.P.L.R. § 302 (2008), *construed in* Vincent C. Alexander, *Transaction of Business, In General, in* SUPPLEMENTARY PRACTICE COMMENTARIES C302:6 (2009). *See also Helicopteros*, 466 U.S. at 423. State long-arm statutes trace their authority to *Int'l Shoe Co.*, 326 U.S. 310, which in turn finds its roots in *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977). Notably, it has been written that it is the relationship "among the defendant, the forum, and the litigation" that are the primary points of analysis when a controversy arises out of or is related to a defendant's contacts with the forum. *Shaffer*, 433 U.S. at 204. Contacts thus do not depend on plaintiff's contacts with the forum but on whether defendant transacted a forum business and whether the cause arose therefrom. This begs, of course, the meaning of "arises from."

129. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §402, Comment b. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §403(2) states:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted. (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

authors offer little aid, however, on what comprises "substantial." It is not made clear whether intention requires conscious purpose or whether reckless indifference will suffice, but vacant space of this kind is typical of, and serves the purpose of, how principled law develops over time.

Thus, despite Justice Scalia professed hyper-sensibility to comity concerns, in important ways the decision in *Morrison* is less respectful of other nations' legal boundaries than the predecessor "conduct and effects test."

In short, there seems little but air under the comity justification for the decision. Indeed, elsewhere in *Morrison*, the majority acknowledged that, if transnational application of § 10(b) by a "'significant and material conduct' test" were authorized by the Act's text, "it would not violate customary international law."[130]

D. DEFERENCE

Typically, the *Chevron* doctrine would oblige the Court to defer to an agency's reasonable interpretation of its animating statute,[131] and the SEC urged the Supreme Court in *Morrison* to do that, to defer to the SEC's view that § 10(b) does have international application and that a "significant and material conduct" test should play the gatekeeper role in determining when § 10(b) may go abroad. The Court refused to do that here. How did it justify that refusal?

Justice Scalia elided *Chevron* by claiming that the Commission had not provided its own interpretation of the statute, but instead merely had "relied on decisions of federal courts—mainly Court of Appeals decisions . . . ."[132] The Court made no mention in this part of the decision that the SEC had itself brought actions premised on existence of a transnational § 10(b).[133] Nor did Justice Scalia offer any support for the suggestion that, in order to earn *Chevron* status, an agency must label its interpretation as such. In ostensible support of its analysis, Justice Scalia cited a pair of SEC

130. *Morrison*, 130 S. Ct. at 2887.

131. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. ("*Chevron*"), 467 U.S. 837, 843–44 (1984) (where legislature implicitly delegated responsibility of a particular matter to an agency, generally courts may not overrule the agency's reasonable interpretation of the enabling statute, and the pre-eminent power to regulate is not necessarily disturbed by prior court decisions that interpret the underlying law in a manner inconsistent with the later regulation). *See also* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). For illustration of where an agency overstepped actual or implied authority, *see* Cuomo v. Clearing House Ass'n, LLC, 129 S. Ct. 2710, 2715, 2721 (2009). For illustration of the SEC overstepping its rule-making powers, *see* Goldstein v. Sec. and Exch. Comm'n., 451 F.3d 873, 881 (D.C. Cir. 2006).

132. *Morrison*, 130 S. Ct. at 2887.

133. *See* examples, *supra* note76.

Releases.[134] Neither Release, however, states, implies, or hints, that an agency must declare formally that it is interpreting law. These Releases do however show the SEC making explicit adoption of circuit level authority for the proposition that, as the SEC had put it in one of them, "[t]he antifraud provisions of the securities statutes proscribe [use of the United States as a base for a fraudulent scheme]. And it is now well settled that this is so even when all the victims are foreigners."[135]

Was the SEC's evident adoption of the "conduct and effects test" sufficient to warrant, if not oblige, deference by the court in *Morrison*? Until *Morrison*, the answer would have been yes.

According to *Fed. Prac. & Procedure* § 8341, "two recent Supreme Court opinions, *Mead* and *Christensen*, . . . suggest that statutory interpretation undertaken in the course of formal adjudication must be given the stiffer *Chevron* deference."[136] In *Mead*, the court "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[137] In short, recent Supreme Court vintage would appear to have obliged deferential treatment by the majority.

The *Morrison* decision nevertheless asserts that deference was not required because the SEC was not making its own interpretation of the statute, but relying upon the Second Circuit's interpretation. Even if that properly rendered inapplicable the stiff *Chevron* deference, it might still have qualified for so-called *Skidmore* deference. Under *Skidmore v. Swift & Co.*,[138] an agency decision merits "respect proportional to its 'power to persuade.'"[139] "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[140]

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134. *In re* Robert F. Lynch, Exchange Act Release No. 11737, 1975 WL 160406 (Oct. 15, 1975); *In re* Application of U.S. Sec. Clearing Corp. and Anthony James Miranti, Exchange Act Release No. 35066, 1994 WL 697646, at *3 nn.14, 16 (Dec. 8, 1994).

135. *Lynch*, 1975 WL 160406, at *4. In truth, the SEC had long since recognized and advocated the transnational application of §10(b). *See, e.g.*, Memorandum of the Securities and Exchange Commission, Amicus Curiae, 1979 WL 200202, *passim*; *see also id.*, at nn. 2–4.

136. WRIGHT & MILLER, FED. PRAC. & PROCEDURE § 8341 (West 2010); U.S. v. Mead Corp. ("*Mead*"), 533 U.S. 218, 231 (2001); Christensen v. Harris County, 529 U.S. 576, 585 (2001).

137. *See Mead*, 533 U.S. at 229; *see also* Sec. and Exch. Comm'n. v. Zanford, 535 U.S. 813, 819–20 (2002) (finding that interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable).

138. 323 U.S. 134 (1944).

139. *Mead*, 533 U.S. at 235.

140. *Skidmore*, 323 U.S. at 140.

If the less rigorous *Skidmore* deference were applicable, whilst one might well suppose that the Supreme Court in *Morrison* could have concluded that the SEC's *amicus* arguments had not been persuasive, the Court still should have been put to the task of accepting that, even by mere reiteration of judicial interpretation, the SEC was expressing views that warranted considerable deferential weight. That of course may be the precise reason why the majority in *Morrison* refused to grant even that to the SEC.

But even had the SEC explicitly labeled an interpretation of § 10(b) as such, the Court says it would have rejected it, writing, in a manner that might be taken as a sideways glance at *Skidmore*, that it need "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[141] The decision seems on tenuous ground even here. We have already seen that the majority's methods of statutory interpretation had departed so far from principle as to prompt Justice Stevens to summarize them as "Justice Scalia's personal view of statutory interpretation." And it seems rich with *hauteur* unreasonableness to characterize as unreasonable agency interpretation of law that on its essential belief in § 10(b)'s extraterritorial application aligned itself with dozens of jurists, including those of renown, who had carefully considered the issue over several decades.

The Court also licensed itself to disallow the SEC's interpretation of § 10(b) because the Court now disapproved of the cases that the SEC and others had been citing for many decades. Apart from the bootstrap nature of this argument, we add that, quite recently, in *Stoneridge*, to validate its statutory interpretation that the very same § 10(b) does not extend to aiders and abettors, the Court had looked to "the course of action" that Congress had adopted in response to the Court's earlier decision on aiding and abetting,[142] and treated Congress's lack of response between that decision[143] and *Stoneridge* as validation of the Court's textual explication.

The "conduct and effects test," whatever its flaws, has been on circuit level display for 35 years. Should not Congressional lack of response to this test validate at least the underlying proposition that § 10(b) extends internationally? True, in respect of the question of aiding and abetting Congress had been presented with a Supreme Court decision, and in the case of § 10(b)'s extraterritorial reach it had not. Still, given the prominence of the "conduct and effects test,"[144] the eminent jurists who had written on it, the SEC's consistent belief in § 10(b)'s extra-national

141. *Morrison*, 130 S. Ct. at 2887 (citing *Aramco*, 499 U.S. at 260).

142. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta Inc., 552 U.S. 148, 173–74 (2008).

143. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

144. Mentioned no fewer than 58 times at the circuit level, and no fewer than 179 times in district court decisions.

personality, lack of Congressional action respecting the premise of § 10(b)'s extraterritorial reach, and that the Court professed to place weight on Congressional "course of action" or lack of it, it seems consistent, if not reasonable, to read Congressional lack of response to the numerous decisions on the extraterritorial scope of § 10(b) as lawmaker acceptance of the law's international possibilities. But Justice Scalia said nothing of this legislative "dog who didn't bark" about § 10(b)'s travels abroad. That observant dog was left to lie.

IV. THE FUTURE

A. DESPITE *MORRISON*, PURCHASERS OF FOREIGN LISTED SECURITIES WILL HAVE ACCESS TO UNITED STATES COURTS

1. Introduction

The *Morrison* decision will have varying impacts on the abilities of large investors to pursue individual claims in federal courts and on smaller ones attempting to advance class claims. *Morrison* will shrink, but probably not extinguish, the ability of investors—American and foreign alike—to recover money lost on efficient foreign markets, and to carry the unintended consequence of an increase in the number of lawsuits initiated in the United States.[145] Both consequences suggested themselves in claims that the New York State Pension Fund believed it may have had against BP.

On June 30, 2010, within a week of the publication of *Morrison*, the *Financial Times* reported that the Fund had planned to pursue a securities claim against BP in federal court on account of the many shares of BP that it had purchased on both America and foreign exchanges.[146] Following *Morrison*, the Fund thought that it would have to pursue claims associated with its foreign purchases in foreign courts,[147] an option that of course

145. Post-*Morrison* decisions to date have been unremarkable. *In re* Banco Santander Securities-Optimal Litig., 732 F. Supp. 2d 1305, 1317 (S.D. Fla. 2010) (*Morrison* applies even if the foreign purchases were purportedly made "in connection with" another's purchase or sale of U.S.-traded securities. Court dismissed claims by investors in a Bahamian fund that had invested in Madoff's fund—even though plaintiffs claim to have made their Bahamian investment for the purposes of indirectly investing in U.S. securities through Madoff); Stackhouse v. Toyota Motor Co., 10 cv 922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010) (*Morrison* bars claims by U.S. investors who purchase securities on foreign exchanges); *see also* Sgalambo v. McKenzie, No. 09 Civ. 10087 (SAS), 2010 WL 3110349, at *17, (S.D.N.Y. Aug. 6, 2010); *see also* Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 626 (S.D.N.Y. 2010).

146. Michael Peel, *New York Fund Rethinks BP Lawsuit*, FIN. TIMES, June 30, 2010, p. 17.

147. *Id.* But see discussion *supra* regarding how the Fund may still be able to bundle all claims in a single, federal venue.

would not be at all available to smaller investors, including those who would have been members of any class that the Fund would have led.[148]

Post-*Morrison* decisions have, if anything, enlarged the scope of that decision.[149] *In re Vivendi Universal, S.A. Securities Litigation* is a securities fraud class action that had been tried to a jury over three months ending January 2010, which resulted in a jury verdict for plaintiffs against the company.[150] Vivendi had "listed" 500 million of its ordinary (foreign) shares, but not for trading purposes; rather, to backstop the equivalent number of ADR shares, and much of the class had purchased ADRs that had been listed on the NYSE. The wrinkle was that all but 122 million of the ADRs had migrated back to European markets.

Following the decision in *Morrison*, the court in *Vivendi* decided that what Justice Scalia "really meant to say" was that § 10(b) reached only securities that were both "listed and traded" on a domestic exchange.[151] Accordingly, the court held that the class could not capture the remaining 378 million listed but not traded shares because no purchases of them had occurred on domestic markets.[152] The court then narrowed the class accordingly.[153]

In *In re Societe Generale Sec. Litig.*, the district court dismissed claims by United States investors who had purchased ADRs OTC in the United States.[154] The court was impressed by assertions that OTC did not qualify as "an official American securities exchange [but] a less formal market with lower exposure to U.S.-resident buyers."[155] The decision in *Societe Generale* adopted the explanation of a pre-*Morrison* decision that trade "in ADRs is considered to be a 'predominantly foreign securities transaction,'" a view that found no support in the more recent *Vivendi* decision.[156]

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148. The Fund's dilemma raises the question of whether in the future a fiduciary/trustee breaches a fiduciary duty by countenancing the investment of plan assets into securities listed on foreign exchanges where the consequence is loss of § 10(b)'s protective powers.

149. *Morrison*'s textual bound reading has resulted in the dismissal of non-securities related RICO claims for want of explicit extraterritorial support in the statute. *See* Norex Petroleum Ltd. v. Access Inds., 2010 WL 4968691, at *3 (2d Cir. Sept. 28, 2010); *see also* Cedeño v. Intel Group, Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (stating that under *Morrison*, RICO is presummed not to appy to claims that are essentially extraterritorial in focus).

150. *See, e.g.*, In re Vivendi Universal, S.A. Securities Litigation, No. 02 Civ. 05571(RJH)(HBP), 2011 WL 590915 (S.D.N.Y. Feb. 17, 2011).

151. *Id.* at *9.

152. *In re Vivendi Universal*, 2011 WL 590915 at *9.

153. *Id.* at *60.

154. No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6, n.5 (S.D.N.Y. Sept. 29, 2010).

155. *Id.* at *6 (citation omitted).

156. Copeland v. Fortis, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010) (citation omitted). *See contra*, Kleinman v. Elan Corp., PLC, 10-cv-08761-AKH, slip op. at 1 (S.D.N.Y. Mar. 18, 2011) (*Morrison* does not preclude claims based on purchase of ADRs or call options respecting them); *also* Stackhouse v. Toyota Motor Co., 10-cv-1429, 2010 WL 3377409, at *2 (C.D. Cal. July 16, 2010) (purchase of

The word "official" does not however appear in the holding of *Morrison*.[157] ADRs unquestionably are securities, and *Morrison* explicitly acknowledges that § 10(b) reaches "the purchase *or* sale of any other security in the United States."[158] *Morrison* moreover does not speak of any kind of a "predominance" test; its purport is to dispense with the need for *ad hoc* balancing work, which predominance tests generally require. *Morrison* is, in a phrase, all about bright lines.[159] *Societe Generale* should have fallen on the other side of that line.

In *In re Royal Bank of Scotland Group PLC Sec. Litig*, plaintiffs asserted 1933 Act causes concerning issuance of Rights ("Rights issue"), and a separate 1933 Act claim based on an exchange offer ("Exchange Offer").[160] Both the Exchange Offer and Rights issue had prospectuses filed with the SEC. The Exchange Offer was ordinary [foreign listed] shares of ABN AMRO Group for Royal Bank of Scotland ("RBS") ordinary [foreign listed] shares. The Rights issue provided opportunity to acquire RBS ordinary shares, its prospectus explicitly stated that the securities will not be registered or sold in the United States, and the offer otherwise was not extended to the United States.[161] So dismissal of that cause seems reasonable—not under *Morrison*, but, dissonantly, the precedent body of balancing law that *Morrison* had overruled.

The prospectus for the Exchange Offer stated that it was made to all shareholders "who are resident in the United States, and to all holders of [__] ADRs, wherever located" pursuant to their own United States prospectus.[162] The court dismissed the claims in part by extending *Morrison* to the 1933 Act via *Morrison dicta* that both Acts had the "same focus on domestic transactions,"[163] and then seemingly ignored *Morrison*'s bright line by the policy decision that, even if "listed" on an American Stock exchange, "[t]rade in ADRs is considered to be a 'predominantly foreign securities transaction.'"[164]

ADS's within § 10(b)); *see also, In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 470–71 (S.D.N.Y. Sept. 14, 2010) (dismissed claims of investors who purchased shares on a European exchange although shares also registered and listed on the New York Stock Exchange).

157. *Morrison*, 130 S. Ct. at 2888 (2010).

158. *Id.* (emphasis added).

159. Evidently, bright lines are difficult to paint. *Vivendi*, spoke of the "spirit" of *Morrison* in re-writing what Justice Scalia had written. *Vivendi*, 2011 WL 590915, at *8.

160. No. 09 Civ. 300 (DAB), 2011 WL 167749, at *5 (S.D.N.Y. Jan. 11, 2011).

161. Rights Issue prospectus filed with SEC on April 30, 2008, at p.59, §2.6.2.

162. Prospectus filed with SEC on July 30, 2007, at Part VII, p.49.

163. 130 S. Ct. at 2885.

164. *In re Royal Bank*, 2011 WL 167749, at *6–7 (citing *Societe Generale*, 2010 WL 3910286, at *4). By focusing on the absence of an allegation that the acquired shares had *not* been purchased outside the United States. *Id.* at *9.

Given that § 10(b) explicitly encompasses purchases *or* sales, that an exchange of shares qualifies as a sale for § 10(b) purposes,[165] and that United States shareholders were told that they could exchange [i.e., sell] their ADRs listed on an American Stock Exchange,[166] sales of ADRs into the Exchange Offer should have enjoyed § 10(b) protection. They did not.

In *Elliott Associates v. Porsche Automobil Holdings SE* ("*Porsche*"),[167] the court dismissed security-based swap agreements that referenced the price of Volkswagen stock, notwithstanding that all actions necessary to effectuate the swap agreements had occurred in the United States. The swap confirmations were between and among the New York venued investment managers and had been executed in New York. The swap agreements contained choice of law and forum selection clauses designating New York federal and local courts.[168] The court nevertheless concluded that *Morrison* had swept away all § 10(b) claims for foreign acquired securities, and according to the court, swap agreements are equivalent to a buy order in the United States for a security traded abroad, an equivalency that the court regarded as "eminently clear" based on an "economic reality" test.[169] The court however acknowledged that swaps are securities in their own right.[170] Regardless, according to the court, §10(b)

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165. SEC v. Nat'l Secties, Inc., 393 U.S. 453, 467 (1969).

166. *In re Royal Bank*, 2011 WL 167749, at *8.

167. Nos. 10 Civ. 0532(HB), 2010 WL 5463846, at *2, *7 (S.D.N.Y. Dec. 30, 2010). On January 28, 2011, plaintiffs filed a notice to appeal the decision.

168. *Contra Porsche*, the court in *RBS* had found a foreign forum selection clause significant. *In re Royal Bank*, 2011 WL 167749, at *9 n.14. The court in *Porsche* also found it notable that the complaints had not attached the swap agreements or *specifically* identified the counterparties. *Porsche*, 2010 WL 5463846, at *2. That absence may be notable at a later stage of proceedings where plaintiffs are put to actual proof, but, a motion to dismiss does not require evidentiary proof. In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations are accepted as true, and all reasonable inferences must be drawn in plaintiff's favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007); Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556, 566 (S.D.N.Y. 2007). On a motion to dismiss, the court's function is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). Nor should the court dismiss a complaint where the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). The court in *Porsche* did not suggest that the claim was implausible.

Rule 9(b) is triggered in claims of fraud. It requires that the complaint "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007). The decision in *Porsche* does not find Rule 9(b) failures.

169. *Porsche*, 2010 WL 5463846, at *5–6.

170. *Id.* at *6 n3.

as interpreted by *Morrison* means "purchases and sales explicitly solicited by the issuer in the U.S."[171]

Although a purpose built decision like *Morrison* might arrive at the same conclusion as the district court in *Porsche*, what is "eminently clear" is that the decision in *Porsche* is analytically unsound. Swaps generally settle in relation to the referenced instrument or index, and generally do not result in the purchase or sale of an actual share of stock. The actual holding of bright-lined *Morrison* was that § 10(b) explicitly reaches "the purchase *or* sale of any other [than American Stock Exchange] security in the United States."[172] The swap instruments in question were securities purchased or sold in the United States. The decision in *Porsche* was wrongly decided.

In *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, purchase orders were placed electronically by traders located in Chicago, but the shares of the foreign issuer ultimately were purchased on a foreign exchange.[173] The court held that for *Morrison* purposes a purchaser does not *per force* occur where the order has been placed.[174] Given that local electronic purchase orders often may result in the purchase of shares listed on any number of exchanges, the decision introduces *Morrison* to the serendipity of where the broker executes the order, opening the theoretical door to § 10(b) protection for shares ordered outside the United States that happen to result in American executions.

Despite *Morrison*, there are means that will permit access to domestic courts on account of securities traded in both the United States and abroad. Investors, most simplistically, could sidestep *Morrison* entirely by purchasing securities only on United States markets, regardless of where else they may be listed. Fiduciaries should be especially sensitive to this choice. Electing to purchase securities abroad that also could be acquired on domestic markets would mean an elective loss of § 10(b) protection, an election which could expose trustees to claims by their own beneficiaries. Access to U.S. federal courts may also be possible by use of § 18 of the Exchange Act.[175] This law would serve primarily individuals having claims

171. *Porsche*, 2010 WL 5463846, at *7 (internal quotation marks omitted).
172. *Morrison*, 130 S. Ct. at 2888.
173. No. 08 Civ. 1958 (JGK), 2010 WL 3860397, at *2 (S.D.N.Y. Oct. 14, 2010).
174. *Id.* at *8.
175. Securities Exchange Act § Sec. 18 provides:

> Liability for Misleading Statements. (a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this Act or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this Act, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which

on account of securities purchased abroad where the purchases were made "in reliance upon" filings made pursuant to the Exchange Act.

Morrison appears to have liberated certain state law securities-related class claims from proscriptions imposed by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").[176] Thus, purchasers of securities abroad also may be able to make use of state law causes of action to gain access to federal courts. But if federal courts were foreclosed, claims arising from state laws nevertheless could be prosecuted in state courts. The opportunity for advancing state law claims, whether suing individually or on behalf of a class, received a surprising and sharp boost recently by the decision in *Anwar v. Fairfield Greenwich Ltd.*[177] The holding rejected what had been the increasingly established view that in New York the so-called Martin Act[178] precludes private suits based on common law causes of action. *Anwar* held that the Martin Act does not bar such claims, so long as they do not derive from or rely upon the Martin Act to establish a required element of the claim.[179] We deal with each of these possibilities below.

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was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

15 U.S.C. § 78r (2010).

176. Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. 105-353, 112 Stat. 3227 (codified as amended in 15 U.S.C. §§ 77b–77ccc, 78a–78ll, 80a–b).

177. 728 F. Supp. 2d 354 (S.D.N.Y. 2010).

178. Martin Act, N.Y. GEN. BUS. LAW §§ 352–359 (McKinney 2010), provides in part:

1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:

(a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

(c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made;

where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted.

2. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to engage in any artifice, agreement, device or scheme to obtain money, profit or property by any of the means prohibited by this section.

179. *Anwar*, 728 F. Supp.2d at 361.

2. *Jurisdiction/Choice of Law*

Section 10(b) and the Exchange Act are not the sole route to federal jurisdiction. For example, 28 U.S.C. § 1332(a)[180] sets out the conditions for "diversity" jurisdiction. District courts shall have original jurisdiction of controversies involving in excess of $75,000 between "citizens of a State and citizens or subjects of a foreign state."[181] The permutations are numerous, but at least carry the possibility that a foreign investor having more than $75,000 in controversy could come into federal court to sue a domestic issuer for common law fraud in connection with its securities regardless of where they had been purchased. A citizen likewise could use district courts to pursue a foreign entity. As a practical matter, diversity based access would be available only to large investors, as their losses must both satisfy the $75,000 threshold and support the substantial costs of litigation.

Section 1332(a) deals with individual controversies. 28 U.S.C. § 1332(d) concerns class actions. That section requires district courts to take jurisdiction over any class action involving $5,000,000, or more, and where "any member of a class of plaintiffs is a [ ] citizen or subject of a foreign state and any defendant is a [ ] citizen or subject of a foreign state."[182] The effect of § 1332(d) is that class actions begun in state courts often are removed to federal courts.

Neither sub-section of § 1332 permits an alien plaintiff to sue an alien defendant in federal court. Other § 1332 conditions being satisfied, both sections, however, seemingly allow an United States citizen to use federal courts to prosecute claims against domestic and foreign issuers on account of securities listed on both an American exchange and abroad. The claims

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180. Which provides:

> Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. § 1332 (2010).

181. 28 U.S.C. § 1332(a)(2).

182. 28 U.S.C. § 1332(d)(2)(C), *amended by* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 105-2, 118 Stat. 4 (2005).

could take on hybrid expression. The cause on account of the securities listed in the United States would rest on § 10(b); the cause for the remainder would be common law fraud or similar actionable right. The foreign plaintiff could likewise use § 1332 to pursue claims in federal courts against a domestic issuer arising from purchases abroad of its securities.

Accordingly, one enterprising complaint brought in federal court involves a class of foreign plaintiffs asserting causes based on state common law, not § 10(b).[183] Plaintiffs seek to take advantage of provision that confers federal jurisdiction on class actions where members are foreign and defendants domestic.[184] United States law firms also have gingerly begun to bring collective actions abroad.[185]

The Securities Litigation Uniform Standards Act bears on this discussion.[186] In pertinent part, SLUSA states that "no covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any state or federal court by any private party" alleging causes lifted from § 10(b). A "covered class action" is defined essentially as one brought on behalf of 50 or more persons concerning "covered securities," which are defined by reference to § 18(b) of the Securities Act of 1933.[187] Section 18(b) of the 1933 Act defines "a covered security" as one listed on a national exchange.[188]

SLUSA's statement of purpose[189] says that it came into being because, since the enactment of the Private Securities Litigation Reform Act of 1995

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183. Class Action Complaint and Demand for Jury Trial, Dandong v. Pinnacle Performance Ltd., 10-CV-8086, 2010 WL 4281248, at ¶¶ 293–389 (S.D.N.Y. Oct. 25, 2010).

184. *Id.* at ¶ 92 (citing 28 U.S.C. §1332(d)(2)(B)).

185. In January 2011, the Stichting Foundation, a special foundation backed by over 140 institutional investors and 2,000 individuals from U.S., Europe, Middle East, and Australia, filed a shareholder fraud action in a Dutch civil court against Fortis N.V., currently known as Ageas NV/BV. *See* http://www.investorclaimsagainstfortis.com/publication.php. *See also* Certification of Class, Silver v. Imax Corp. (2009), CV-06-3257-00, at ¶ 164(Can. Ont. Sup. Ct. J.) (court certifies global class).

186. Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. 105-353, 112 Stat. 3227 (codified as amended in 15 U.S.C. §§ 77b–77ccc, 78a–78ll, 80a–b).

187. 15 U.S.C. § 78bb(f)(5)(E).

188. Which states:

> (b) For purposes of this section, the following are covered securities:
>
> (1) A security is a covered security if such security is –
>
> (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing on the National Market System of the Nasdaq Stock Market (or any successor to such entities);
>
> (B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiation or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A).

15 U.S.C. § 77r(b)(1)(A)-(B).

189. SLUSA § 2, 15 U.S.C. § 78a note.

("PSLRA"),[190] "a number of securities class action lawsuits have shifted from federal to state courts [which] has prevented that Act from fully achieving its objectives [and accordingly SLUSA aims] to prevent certain state private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." The PSLRA applies "in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."[191] "Chapter" refers to Chapter 2B, the Exchange Act of 1934. The just quoted portion of the PSLRA does not explicitly mention § 10(b).[192]

On its face, SLUSA does not apply to individuals, or even 49 of them, and surely ought not apply to class actions seeking recoveries for fraud alleged to have occurred in connection with securities listed abroad. These securities ought not be regarded as "a covered security" because they are not listed on a national exchange. And, given that *Morrison* held that § 10(b) does not apply as a matter of law to foreign listed securities, lawsuits arising from such securities would not implicate the PSLRA (concerned with actions "arising under this chapter") and in turn not implicate SLUSA, which aims to prevent frustration of the PSLRA.[193] Thus, while *Morrison* narrowed § 10(b)'s boundaries, it *per force* enlarged the territory in which state causes may operate.

Class actions begun in state courts and then removed to federal courts through the Class Action Fairness Act ("CAFA") would be regulated by federal class action standards following the 2010 decision by the Supreme Court in *Shady Grove*.[194] *Shady Grove* held that, once properly in federal court, federal class action rules control certification processes and available remedies, rejecting the argument that state law limitations on class proceedings should carry over to federal class proceedings.[195] *Shady Grove* thus should facilitate the advancement of class actions in federal courts based on state law claims, especially when attached to a federal claim; for example, where class members acquired securities both on domestic and

190. *See* Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 78u-4).

191. 15 U.S.C. § 78u-4(a)(1).

192. *Id.*

193. In *Merrill Lynch, Pierce, Fenner & Smith v. Dabit* ("*Dabit*"), the court held that SLUSA may apply even where a § 10(b) was not specifically alleged. 547 U.S. 71, 84–89 (2006) However, in *Dabit*, (a) securities were "covered"within meaning of SLUSA; (b) claims could have been brought or at least arguably fell within § 10(b), and (c) plaintiff initially filed a complaint that encompassed what could have been § 10(b) claims. *Id.* None of these conditions exists post-*Morrison* in respect of securities listed abroad. Still, there is the risk that a result oriented court would extend *Dabit*.

194. 28 U.S.C. § 1332(d); Shady Grove Orthopedic Assocs. P.C. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010).

195. 130 S.Ct. 1431 at 1456–57.

foreign exchanges. Let's have the local considerations of New York court actions stand in for many states.

New York's Supreme Court—the equivalent of a federal district court—has "original, unlimited and unqualified jurisdiction and is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed."[196] In *Univ. of Montreal Pension Plan v. Banc of America Sec. LLC.* ("*UMP*"),[197] international investors sued British Virgin Island fund administrators in federal court under New York law over losses stemming from BVI hedge funds. In *UMP* the "the overwhelming majority of" investors were international and only four in New York, but the "majority of the events" in the case and "the bulk of the relevant evidence" were in New York. The *UMP* court further held, "[t]his case, involving a large number of plaintiffs and defendants from many jurisdictions, can be efficiently heard in the federal court in New York and this Court has a good deal of experience adjudicating complex cases."[198] Much of the conduct of fraud and the management of the fund had taken place in New York. Denying the *forum non conveniens* motion,[199] the *UMP* court held "deference towards a plaintiff's choice of forum extends *even to foreign plaintiffs*, where those plaintiffs are not forum shopping, but rather have selected a forum for valid reasons, such as convenience."[200]

Choice of law considerations also emerge where common law causes are pressed. Applying New York choice of law rules, the court in *UMP* noted that, if there is an "absence of substantive difference" among the relevant jurisdictions, New York courts are "free to apply" New York law.[201] Where there is conflict, New York applies an "interest analysis," which for torts is determined by "the law of the jurisdiction where the tort occurred . . . because that jurisdiction will have the greatest interest in

196. Matter of Fry v. Village of Tarrytown, 680 N.E.2d 578, 580 (N.Y. 1997); *see also* DAVID D. SIEGEL, NEW YORK PRACTICE, note 1, § 12, at 16 (4th ed. 2005) ("[The Supreme Court is] the state's only court of 'general' jurisdiction. This refers to original jurisdiction and means that the court has almost all of the jurisdiction the state can confer.").

197. 446 F. Supp. 2d 163 (S.D.N.Y. 2006).

198. *Id.* at 178.

199. *Id.* at 177–78. It is not likely that a federal court would use *forum non conveniens* to decline jurisdiction over a plaintiff—especially one resident in the forum—who had simultaneous claims under § 10(b) for purchases made on domestic exchanges. The same prediction could not be made for the foreign investor with no local contacts who acquired securities outside the local forum. Under New York law, it is difficult to show deception within the state if the plaintiff had not been present in New York. *See, e.g.*, Goshen v. Mutual Life Ins., 746 N.Y.S.2d 858, 864(N.Y. App. Div. 2002) (fraudulent policy and scheme initiated in New York. Nevertheless, deception deemed to have occurred in Florida where plaintiff resided, and where she read and purchased the policy); Mayfield v. Gen. Elec. Capital Corp., No. 97-2786, 1999 WL 182586, at *10 (S.D.N.Y. Mar. 31, 1999) (no New York claim where defendants in New York but solicitation occurred elsewhere).

200. *UMP*, 446 F. Supp. 2d at 177 (emphasis added).

201. *Id.* at 191.

regulating behavior within its borders."[202] In *UMP*, "plaintiffs [were] an international group, located in both New York and BVI" and "in locations with only limited connection to the conduct at issue."[203] The court nevertheless, applied New York law, stating that "New York has a strong interest in applying its law with respect to defendants who aid and abet torts masterminded and executed by hedge fund managers from within the state."[204]

In *Cromer*,[205] investors in an offshore investment fund managed from New York brought a securities class action against Bermuda administrators and auditors as well as their U.S. and international affiliates. Plaintiffs also had brought common law fraud claims under New York law.[206] Because the victims of the fraud were geographically dispersed, the court held that New York's law would apply as the state "where the fraud originated and where substantial activities in furtherance of the fraud were committed."[207]

In both *UMP* and *Cromer* common law claims, including aiding and abetting fraud and breach of fiduciary duty, survived motions to dismiss on the merits. Certainly prior to *Anwar* it was less than entirely certain that either of these causes could be privately maintained under New York law. *Anwar* changed those odds in a plaintiff's favor.[208]

Comity-style considerations also exist at the state level, bearing on whether common law causes of action will apply extra-territorially. The principal considerations are: (a) is there any statutory prohibition of extraterritorial application of the law; and (b) would application of one state's law unduly intrude on other states? "[T]his doctrine [respecting interpretation of laws] does not forbid the state from investing its courts with jurisdiction over causes of action which accrue in foreign states provided that such causes do not contravene the public policy of this state."[209]

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202. *UMP*, 446 F. Supp. 2d at 192 ("[a] tort occurs in the place where the injury was inflicted" generally, where the plaintiffs are located).

203. *Id.* at 193 (citing Cromer Fin. Ltd. v. Berger, 137 F.Supp. 2d 452, 492 (S.D.N.Y. 2001)).

204. *Id.* at 194 (where many of the critical events leading to the cause occurred abroad, it also may be that foreign law will govern).

205. Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d at 492 (S.D.N.Y. 2001).

206. *Id.* (locus of the fraud was "the place where the injury was inflicted, as opposed to the place where the fraudulent act originated").

207. *Id. N.b.*, that local law may permit jurisdiction does not necessarily mean that its laws would measure the misconduct alleged.

208. *See infra* "State Law Causes and Presumptions."

209. N.Y. STAT. LAW § 149, Comment (McKinney 2010). *See* Lucas v. Estate of Stavos, 609 N.E.2d 1114, 1122 (Ind. Ct. App. 1993) ("Where . . . rights and remedies are created by statute *and not by common law*, the statute operates within the state where it was enacted but has no extraterritorial force or effect upon actions arising in other jurisdictions." (emphasis added)). The *Lucas* court cites the ancient but relevant reasoning of *Buckles v. Ellers*, 72 Ind. 220, 1880 WL 6323 (Ind. 1880):

> [I]n all purely personal actions of a transitory nature for torts at common law, a citizen of a State may sue a citizen of another State, in the courts of such other State, or of any State

Comity may also come into play under the guise of whether American courts can extinguish claims of persons who purchased foreign listed securities although those claims could not have been brought in the United States. This anomalous prospect follows from the *Matsushita* decision,[210] which held that class plaintiffs in state court proceedings could release class member claims that could not have been brought in those courts.[211] Federal courts are, however, obliged to give Full, Faith and Credit to state court releases. Foreign courts are not equally obliged to do so.[212] We turn now to identification of securities related claims that may find greater employment, if not given actual life, as a result of *Morrison*.

B. POSSIBLE PRIVATE RIGHTS OF ACTION OTHER THAN § 10(B)

1. Section 18.

Section 18 of the Exchange Act permits private actions arising from securities fraud wherever the purchased instruments were listed, but only to the extent that the investor purchased "in reliance upon" defendants' statements made in a filing pursuant to the Act or any rule or regulation thereunder.[213] Unlike § 10(b), § 18 does not appear to require a showing of

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> wherein he may reside, or may be found and served with process, without regard to the place or State in which the injury may have been perpetrated. But that where certain acts are made wrongs by statute, which were not such theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement always upon the statutes by which they are created. And such statutes will be enforced only by the courts of the State wherein they are enacted.

Id. at 242 (citing DAVID RORER, AMERICAN INTER-STATE LAW 144–45 (1879)). *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976), *superseded by statute as recognized in* Gallea v. United States, 779 F.2d 1403, 1405 n.1 (9th Cir. 1986) (suit against a Nevada bar that sold alcohol to an intoxicated California driver who then caused an accident in California). The court ruled that a California statute did not have extraterritorial application, but the bar was liable nevertheless for common law negligence. 546 P.2d at 726–27; Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *abrogated by* West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. Aug. 25, 1983) (Wisconsin bar owner liable under Minnesota common law negligence, but not local statute).

210. *See* Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 380 (1996). A class representative may release rights of class members who have some potential claims under U.S. law arising out of the same transaction not covered by § 10(b). Presumably, though, foreign courts would be intolerant of efforts by U.S. courts to extinguish rights of persons who had no contact with the United States and no basis upon which to assert any claim under any United States law.

211. *Id.* at 380.

212. *In re* Vivendi Universal, S.A., 242 F.R.D. 76,109 (S.D.N.Y. 2007). United States courts would however recognize those judgments and accompanying releases in respect of Americans who had purchased securities listed abroad.

213. *See supra* text accompanying note 119. It also may be that a § 10(b) class suitor would agree to release claims of foreign investors that could be asserted under § 18. This would create an as yet to

scienter.[214] Section 10(b) speaks of "manipulative or deceptive device or contrivance." Section 18 speaks only of "false or misleading" statements. The requirement of "eyeball reliance" is, however, one that a class of investors may be hard put to satisfy. For that reason, § 18 will prove most useful for large individual investors who have purchased securities abroad of an issuer whose shares also were listed domestically. There is some possibility that *Morrison* would be used to delimit the extraterritorial reach of § 18. There is language in that decision that speaks of the "Exchange Act" rather than just § 10(b).[215] But that risk should not be great. The decision expressly addresses the issue of "*whether* §10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs", etc.[216] Moreover, the decision's purported close textual reading related to § 10(b), whose text is very importantly from that of § 18. Section 18 seemingly provides blanket license to those who had relied on SEC filings. Most important, though, as a practical if not analytic matter, as classes are not likely to use § 18, Justice Scalia would not see the need to limit the law's geographic reach in order to assure that classes and their counsel never arrive at Shangri-La.[217]

2. *Title 12 U.S.C. Section 632.*

This little employed section confers federal jurisdiction where one of the parties is a "corporation organized under the laws of the United States," and the action arises out of, *inter alia*, international banking or financial operations. "Laws of the United States" means created by or pursuant to a federal statute, rather than state laws.[218]

3. *Trustees*

Going forward, some investors or fund beneficiaries may be able to pursue fiduciaries who have abandoned the protection of § 10(b) by purchases abroad of securities that could have been acquired on a domestic

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be tested hurdle for a foreign investor who would employ § 18. The hurdle however could be easily surmounted by "opting-out" of the settlement class that would impose such a release, but foreign investors must be alert to the possibility of such a release.

214. *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 540 F. Supp. 2d 800, 813 (S.D. Tex. 2007). However, section 18 also gives the court discretion to require an undertaking and shift attorneys fees, events that would come to pass presumably only in the event of a "baseless and vexatious" claim. Seegrave Corp. v. Vista Resources, Inc., 534 F.Supp. 378, 385 n.5 (S.D.N.Y. 1982).

215. *E.g.*, *Morrison*, 130 S. Ct. at 2885 ("we reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad . . .").

216. *Id.* at 2875 (emphasis added).

217. *Morrison*, 130 S. Ct. at 2886.

218. Creaccones Con Idea, S.A. de C.V. v. Mashreqbank PSL, 232 F.3d 79, 82 (2d Cir. 2000).

exchange.[219] ERISA makes a plan administrator a fiduciary with respect to the plan:

> to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[220]

Plan administrators are held to the standard of care of a prudent person and:

> shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[221]

Given these duties and standards, presumably a plan-beneficiary could claim imprudence by a private plan or pension fund administrator/trustee who elected to acquire securities beyond the zone of § 10(b) protection. In *In re Pfizer Inc. Erisa Litigation*,[222] plaintiffs alleged that defendants breached their fiduciary duty by failing to manage the plan assets prudently. Plaintiffs claimed imprudence in continuing to make and maintain the questioned investments, which the court found sufficient to state an ERISA claim.[223] The remedies available against a deficient trustee are significant. ERISA § 409 makes a trustee who breaches a fiduciary duty to an employee benefit plan "personally liable to make good to such plan any losses to the plan resulting from such breach and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate."[224] ERISA § 502(a)(2) empowers beneficiaries or participants to obtain appropriate

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219. *See* Hecht v. Andover Associates Mgmt Corp., 27 Misc.3d 1202(A), 2010 WL 1254546, at *10 (N.Y. Sup. Ct. 2010) ("Plaintiff alleges that Andover Management breached its fiduciary duty by failing to exercise diligence and prudence, not with respect to investment recommendations, but in the management of Andover Associates' investments. Thus, plaintiff's breach of fiduciary duty claim does not arise from alleged securities fraud and is not . . . preempted by the Martin Act.").

220. ERISA is the acronym for Employee Retirement Income Security Act. ERISA claims in federal court pre-empt state law claims for breach of fiduciary duty with regard to any private employee benefit plan or pension fund. Fuller v. INA Life Ins. Co. of New York, 533 N.Y.S.2d 215, 216 (N.Y. Sup. Ct. 1988) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41(1987); 29 U.S.C. § 1002(21)(A) (2010).

221. *Fuller*, 533 N.Y.S.2d at 216 (quoting 29 U.S.C. § 1104(a)(1)).

222. No. 04 Civ. 10071, 2009 WL 749545 (S.D.N.Y. Mar. 20, 2009).

223. 2009 WL 749545, at *8.

224. 29 U.S.C. § 1109(a) (2010); *see also* U.S. v. Mason Tenders Dist. Council of Greater New York, 909 F. Supp. 891, 893 (S.D.N.Y. 1995).

relief under ERISA § 409 and § 502(a)(3) empowers them to obtain other appropriate equitable relief to redress violations of ERISA § 409.[225] The court in *Harris v. Finch, Pruyn & Co.*,[226] held that "[s]ection 502(a)(2) is not limited to equitable remedies," but allows for a "wider range of remedies, including compensatory damages."[227] Compensatory damages could be measured by successful results in lawsuits brought against the same issuer on account of US listed stocks. What the entire range of remedies might include also may be developed by reference to other statutes occupying fiduciary territory.

New York State's Prudent Investor Act,[228] to name one example, imposes the prudent investor standard on trustees who invest and manage property.[229] Where the initial investments are imprudent, damages are the amount invested plus interest.[230] The same would hold for an action brought in state court, or on behalf of a public pension fund not preempted by ERISA.[231]

4. State Law Causes and Presumptions

An important, possibly essential, feature of actions grounded on § 10(b) is that the law generally allows the presumptions that material information causes changes in market prices and that investors generally rely on the integrity of those prices.[232] As a consequence, misrepresentations or omissions of adverse, material information presumably inflate prices paid for securities, thereby inflicting injuries on those who overpaid. The shorthand description of this set of presumptions is "fraud on the market" theory, and that theory carries with it presumptions

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225. 29 U.S.C. §§ 1132(a)(2), (a)(3), (B)(i).

226. No. 1:05-CV-951 (FJS/RFT), 2008 WL 4155638 (N.D.N.Y. Aug. 26, 2008).

227. *Id.* at *2.

228. N.Y. EST. POWERS & TRUSTS LAW §11-2.3 (2010).

229. Newhoff v. Rankow, Cohen, & Issac P.C., 435 N.Y.S.2d 632, 637 (N.Y. Sur. Ct. 1980).

230. *Id.*

231. Brooks v. Key Trust Co. Nat. Ass'n, 809 N.Y.S.2d 270 (N.Y. App. Div. 2006) (breach of fiduciary duty claim); People *ex rel.* Cuomo v. Merkin, No. 450879/09, 2010 WL 936208, at *10 (N.Y. Sup. Ct. Feb. 8, 2010) (defendant investment management had a fiduciary duty to act with care and loyalty).

232. Basic Inc. v. Levison, 485 U.S. 224, 241–242, 246 (1988). Fogarazzao v. Lehman Bros., Inc., 232 F.R.D. 176, 185 (S.D.N.Y. 2005) ("The fraud on the market presumption is simply a 'useful device[ ] for allocating the burdens of proof between parties;' in the class certification context, it allows plaintiffs to prove reliance by proving 'that the scheme as a whole artificially inflated prices.'") (quoting *Basic*, 485 U.S. at 245); *In re* Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 555 (D.N.J. 2005) ("However, the requirement of showing direct reliance presents an unreasonable evidentiary burden in a securities market where face-to-face transactions are rare and where lawsuits are brought by classes of investors; therefore, the Third Circuit has adopted a rule, the fraud on the market theory, that creates a presumption of reliance in certain cases.").

of causality and reliance. Presumptions are procedural devices, not substantive law.[233] They appear in a great panoply of circumstances.[234]

We examine the laws of four states: New York, California, Illinois, and Texas. Particular attention will be paid to whether local law creates the kind of evidentiary presumptions that make possible class wide litigation involving numerous transactions in impersonal markets. The most important of these is a presumption of reliance, where reliance is required at all. What then are private causes of actions and presumptions, if any, to be found in our four-state sample?

a. New York

Ashland Inc. v. Morgan Stanley & Co., Inc.,[235] noted that several courts have held that the Martin Act precludes private rights based on common law claims other than fraud,[236] and have extended the Martin Act

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233. *See, e.g., In re* Elter, 756 F.2d 852, 856 (Fed. Cir. 1985).

234. Compania Sude Americana De Vapores, S.A. v. I.T.O. Corp. of Balitmore, 940 F.Supp. 855, 863 (D. Md. 1996) ("[T]he doctrine [of *res ipsa loquitor*] is not a theory of liability, but an evidentiary device that permits an inference of negligence to be drawn from a set of proven facts."); Constar, Inc. v. Plumbers Local 447, 568 F.Supp 1440, 1444 (E.D. Cal. 1983) (regarding the Moore Dry Dock rules: "Taken together they are nothing more or less than a device to be used in evaluating evidence, developed to assist the trier of fact in determining whether or not specific union conduct (generally picketing) is valid, primary activity or has a prohibited secondary object . . . the Moore Dry Dock rule is only an evidentiary tool."); Panduit Corp. v. Band-It-Idex, Inc., No. 00 C 1461, 2000 WL 1121554, at *16 (N.D. Ill. June 27, 2000) ("[t]here is a strong presumption of validity for issued patents").

235. 700 F. Supp. 2d 453, 471 (S.D.N.Y. 2010).

236. Unless the claims are based on facts that provide the Attorney General with grounds to institute an action under the Act. *See* Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 189–90 (2d Cir. 2001); *see also* Granite Partners LP v. Bear, Stearns & Co., 17 F. Supp. 2d 275, 291 (S.D.N.Y. 1998). Similarly, in Stephenson v. Citgo Group Ltd., 700 F. Supp. 2d 599, 613 (S.D.N.Y. 2010) (the court found that Martin Act preemption does not extend to those common law claims that require elements beyond what is necessary for Martin Act liability). The court states that:

> New York courts have offered a persuasive justification for allowing common law fraud claims to proceed while dismissing negligent misrepresentation and breach of fiduciary duty claims: "the latter two causes of action, like the Martin Act itself, do not require proof of deceitful intent; common law fraud, however, does . . . courts concerned with preserving the Attorney General's exclusive domain therefore preclude claims which essentially mimic the Martin Act, but permit common law fraud claims, which require an additional element."

700 F. Supp. 2d at 613–614; *see also* Whitehall Tenants Corp. v. Estate of Olnick, 623 N.Y.S.2d 585, 585 (N.Y. App. Div. 1995) ("Without evidence of reliance or intent to defraud . plaintiff is endeavoring to vindicate [rights committed] exclusively to the Attorney General."); *Granite Partners L.P.*, 17 F. Supp. 2d at 291 n.8 ("The Martin Act does not preclude private litigants from bringing common law fraud claims because such claims require a plaintiff to prove intent or scienter. Therefore, courts allow these claims to proceed while simultaneously dismissing negligent misrepresentation and breach of fiduciary duty claims."); Pro Bono Invs., Inc. v. Gerry, No. 03 Civ. 4347 (JGK), 2005 WL 2429787, at *16 n.16 (S.D.N.Y. Sept. 30, 2005) ("Unlike Counterclaims Eight through Thirteen and Fifteen [alleging inter alia, breach of fiduciary duty, negligence, and gross negligence], the common law fraud alleged in the Seventh Counterclaim is not 'covered' by the Martin Act because it requires an

and its pre-emptive reach to instances where a "substantial portion of the events giving rise to the claim" occurred in the state, or even where venue is appropriate in New York.[237] The Martin Act limits itself to fraud cases that take place "within or from New York,[238] but, as *Ashland* reported, considerable expansionist plasticity has been shown in deciding whether the case arose "within or from" the state. It has sometimes sufficed that "substantial portion of events" happened in the state, or even that venue is proper in the state.[239] As a result, unless a plaintiff can allege that the claims arose without New York jurisdiction because transactional events did not have a substantial portion take place within or from the state, that suitor will be hard-pressed to escape the argument that the Martin Act applies and pre-empts the cause.

Addressing the Martin Act's pre-emptive authority, the court in *Anwar* recently held that "the Martin Act does not preclude [New York] state common law causes that do not derive from or rely upon the Martin Act to establish a required element of the claim."[240] The decision distinguished the power of the New York Attorney General solely to enforce the Act and transactions *covered* by it from the right of individuals to bring claims based upon common law that the Act *did not create*;[241] that is, so long as the cause was not created by the Act, but exists independent of the Act, then even wrongs also covered by the Martin Act would not be pre-empted.[242] The decision in *Anwar* did note a division in New York authority respecting the pre-emptive authority of the Martin Act, and that the issue is coursing its way through the New York appellate process.[243] Resolution of that issue will bear importantly on the power of individuals and classes alike to pursue § 10(b) like claims in New York state or federal courts. One supposes that New York will be venue for a considerable part of non § 10(b) based litigation in the securities fraud arena.

It is not clear that a fraud on the market theory equivalent with its presumptions would apply where New York common law serves on the basis for a securities fraud claim; but it is almost certainly less likely to in

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additional element of deceitful intent."); *In re* Bayou Hedge Fund Litig., 534 F. Supp. 2d 405, 421 (S.D.N.Y. 2007) ("The vast majority of state and federal courts have found that causes of action related to a plaintiff's securities fraud claim that do not include *scienter* as an essential element are typically preempted by the Martin Act, in contrast to a claim requiring intent, such as a claim for common law fraud.").

237. *Ashland*, 700 F. Supp. 2d at 473 (citation omitted).

238. N.Y. GEN. BUS. LAW §352-c(1) (2010).

239. *See Ashland*, 700 F. Supp. 2d at 473.

240. Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 354, 371 (S.D.N.Y. 2010).

241. *Id. passim*.

242. *See supra* note 175.

243. *Anwar*, 728 F. Supp. 2d at 366.

instances involving misrepresentations rather than omissions.[244] Regardless of how the Martin Act decisions resolve, common law claims could be available to plaintiffs who can allege that their cause arises under the laws of another forum and where the parties' interactions were exclusively without the state. N.Y. Gen. Bus. Law § 349—the state's Uniform Deceptive Acts and Practices counterpart—has been held inapplicable to securities fraud claims.[245]

b. California

The antifraud provisions of California's state securities law permit a plaintiff to sue for misrepresentations that affect the market without having to prove actual reliance.[246] The "very purpose of these statutes is to 'afford

244. *See supra* text accompanying notes 171–173. In *In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621, 643 (S.D.N.Y. 2008), the Second Circuit observed that "federal courts repeatedly . . refuse[] to apply the fraud on the market theory to state common law cases despite its wide acceptance in the federal securities fraud context." However, the court recognized that there is an "open question" in the Second Circuit as to whether the fraud on the market theory can be used to satisfy the reliance requirement of a common law fraud claim under New York law. *Id.* According to *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001), the New York Court of Appeals has never addressed this issue and New York's lower courts have come to varying conclusions, with a number holding that in New York proof of individual reliance is unnecessary in cases involving fraudulent material omissions. *See* Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179, 198 (N.Y. App. Div. 1998) (citing Brandon v. Chefetz, 106 A.D.2d 162, 167 (N.Y. App. Div. 1985)). New York courts have declined to extend this presumption of reliance to cases involving fraud based on affirmative misrepresentations. *See* Strauss v. Long Island Sports, Inc., 60 A.D.2d 501, 509 (N.Y. App. Div. 1978). Federal district courts applying New York law also have differed on this question. In *In re* Blech Sec. Litig., 961 F.Supp. 569, 587 (S.D.N.Y. 1997), the court held that a fraud on the market theory was not available in common law cases alleging misrepresentations or omissions but that it was available in the context of market manipulation. Other cases have dismissed common law fraud claims for failure to allege actual, direct reliance. *See, e.g.*, *In re* Motel 6 Secs. Litig., Nos. 93 Civ. 2183 (JFK), 93 Civ. 2866 (JFK),1997 WL 154011, at *5–6 (S.D.N.Y. Apr. 2, 1997); *Banque* Arabe Et Internationale D'Investissement v. Maryland National Bank, 850 F.Supp. 1199, 1216, 1223 (S.D.N.Y. 1994); Turtur v. Rothschild Registry Int'l, Inc., No. 92 Civ. 8710 (RPP), 1993 WL 338205, at *6–7 (S.D.N.Y. Aug. 27, 1993). More recent district court cases seem against application of presumption of reliance to common law fraud claims. *See, e.g.*, *In re* Marsh & Mclennan Cos., Inc., 501 F. Supp. 2d 452, 493 (S.D.N.Y. 2006); Feinberg v. Katz, No. 01 Civ. 2739, 2007 WL 4562930, at *6 (S.D.N.Y. Dec. 21, 2007). Whether or not reliance must be proven or presumed, common law fraud may sometimes be pursued on a class-wide basis. *See, e.g.*, Abu Dhabi Commercial Bank v Morgan Stanley & Co., 651 F. Supp. 2d 155, 181 (S.D.N.Y. 2009) (denying motion to dismiss plaintiffs' common law fraud claim within their class action complaint). Generally, though, one must expect resistance to class certification if reliance must be proven. *See, e.g.*, Vermeer Owners, Inc. v. Guterman, 169 A.D.2d 442, 445 (N.Y. App. Div. 1991) (trial court's grant of class certification on common law fraud claim clear error because in a "complex fraud action, [class certification is] unlikely to be granted due to the lack of predominance of common issues of law or fact.").

245. *See* Cyber Media Group, Inc. v. Island Mortgage, 183 F. Supp. 2d 559, 581 (E.D.N.Y. 2002).

246. Mirkin v. Wasserman, 858 P.2d 568, 580 (Cal. 1993). *See* CAL. CORP. CODE §§ 25400, 25500 (2010).

the victims of securities fraud with a remedy without the formidable task of proving common law fraud.'"[247] These statutes impose:

> no requirement . . . that the plaintiff rely upon the statements or acts of the defendant or even that he be aware that the defendant made them or engaged in them. All that is required is that the plaintiff establish that the price paid or received was affected by the defendant's conduct or statements. This *per* force presumes that someone acted on the basis of the defendant's wrongful conduct without having to prove that he personally was influenced by such conduct.[248]

Morrison may have unwittingly revived securities claims based on California's Unfair Competition Law ("Section 17200").[249] Section 17200 had been a mechanism for launching state law based securities claims until SLUSA foreclosed its use.[250] Because *Morrison* held that § 10(b) no longer applies to foreign listed securities, SLUSA should no longer bar the employment of Section 17200 on account of purchases of foreign listed securities.

The Section 17200 requires that a cause based on fraud or deception show that "members of the public are likely to be deceived."[251] Reliance is satisfied by showing that the misleading or omitted data was an "immediate cause of the plaintiff's injury producing conduct,"[252] with "a presumption, or at least an inference of reliance" accompanies a showing of materiality.[253] Materiality is determined objectively by the reasonable man standard.[254]

Finally, in California a claim for constructive fraud, defined in the California Civil Code has a relaxed reliance element.[255] Constructive fraud allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship,[256] and constructive fraud

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247. *Mirkin*, 858 P.2d at 580. (quoting Bowden v. Robinson, 136 Cal.Rptr. 871, 877–78 (Cal. Ct. App. 1977)).

248. *Id.* at 580.

249. CAL. BUS. & PROF. CODE § 17200 (2010).

250. *See In re* Charles Schwab Corp. Sec. Litig., 257 F.R.D. 534 (N.D. Cal. 2009); Overstock.com, Inc. v. Gradient Analytics, Inc., 61 Cal.Rptr.3d 29 (Cal. App. Ct. 2007).

251. Aron v. U-Haul Co. of California, 49 Cal. Rptr.3d 555, 562 (Cal. Ct. App. 2006).

252. Hale v. Sharp Healthcare, 108 Cal. Rptr.3d 669, 678 (Cal. Ct. App. 2010).

253. Weinstat v. Dentsply Int'l., Inc., 103 Cal. Rptr.3d 614, 622 (Cal Ct. App. 2010).

254. *In re* Tobacco II Cases, 207 P.3d 20, 39 (Cal. 2009).

255. CAL. CIV. CODE. §§ 1572, 1573 (2010). Constructive fraud requires (1) the existence of a duty due to a relationship between the parties, (2) violation of the duty by making deceptive material representations of past or existing facts or remaining silent when a duty to speak exists, (3) reliance thereon by the complaining party, (4) injury to the complaining party as a proximate cause thereof, (4) and the gaining of an advantage by the party to be charged at the expense of the complaining party. *See e.g.*,Gen. Am. Life Ins. Co. v. Rana, 769 F.Supp. 1121, 1126 (N.D. Cal. 1991).

256. Estate of Gump, 2 Cal.Rptr.2d 269, 281 (Cal. Ct. App. 1991).

"presumes the element of reliance absent substantial evidence to the contrary."[257]

c. Illinois

Federal courts in Illinois have declined to extend the fraud-on-the-market presumption to Illinois common law fraud claims.[258] Plaintiffs must prove actual reliance to prevail on a claim for common law fraud.[259] Reasonable reliance is an element of a fraud claim under the Illinois Securities Laws.[260]

Illinois' Consumer Fraud and Deceptive Business Practices Act,[261] prohibits "unfair or deceptive acts or practices, including but not limited to the use or employment of deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact." Actual reliance is not an element of a cause of action under this Act, and, hence, actual reliance need not be shown. The Act is intended to protect consumers and business persons against fraud, unfair methods of competition and other unfair business practices.[262] A plaintiff must show "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception during a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception."[263]

The Act provides "greater protection than the common law action for fraud [because] a plaintiff suing under the Act need not establish actual reliance."[264] However, the plaintiff must still show that he was deceived to satisfy the statutory requirement of proximate cause.[265] In *Martin v. Heinold Commodities, Inc.*, the court concluded that in securities investment cases where plaintiffs allege that they have suffered financial loss and file an action under the Consumer Fraud Act, loss causation must

257. Edmunds v. Valley Circle Estates, 20 Cal.Rptr.2d 701, 708 (Cal. Ct. App. 1993).

258. *See In re* Soybean Futures Litig., 892 F. Supp. 1025, 1059–60 (N.D. Ill. 1995).

259. Barille v. Sears Roebuck and Co., 682 N.E.2d 118, 122–23 (Ill. App. Ct. 1997).

260. 815 ILL. COMP. STAT. ANN. 5/12 (2010). *See* Gandhi v. Sitara Capital Mgmt., LLC, 689 F. Supp. 2d 1004, 1014 (N.D. Ill. 2010).

261. 815 ILL. COMP. STAT. ANN. 505/2 (2010).

262. Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 961 (Ill. 2002).

263. Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 160–61 (Ill. 2002).

264. *Barille*, 682 N.E.2d at 124. *See also* Martin v. Heinold Commodities, Inc., 643 N.E.2d 734, 754 (Ill. 1994); Siegel v. Levy Org. Dev. Co., 607 N.E.2d 194, 198 (Ill. 1992); Adler v. William Blair & Co., 648 N.E.2d 226, 233-34 (Ill. App. Ct. 1995).

265. *Oliveira*, 776 N.E.2d at 160–61.

be shown to recover damages:[266] Loss causation means that "the investor would not have suffered a loss if the facts were what he believed them to be."[267]

d. Texas

Texas courts require a showing of actual reliance and do not recognize a fraud-on-the-market theory of reliance for common law claims.[268] Similarly, to succeed with a claim for statutory fraud under the Texas Business and Commerce Code, "plaintiffs must show that they actually and justifiably relied upon [defendant's] allegedly fraudulent misrepresentations.[269] However, under the Texas Securities Act ("TSA"),[270] a plaintiff does not have to prove reliance; it is not an element of a TSA claim.[271] A purchaser must prove only that a security was sold by means of (1) an untrue statement of material fact or (2) an omission to state a material fact that is necessary in order to make the statements made in light of the circumstances under which they are made not misleading.[272]

In short, *Morrison* certainly limits fraud claims for securities purchased abroad, but does not shut all doors to United States courthouses for those seeking relief for injuries related to purchases of those securities. It even may open one or more doors that SLUSA had closed.

C. Congress and the SEC May, In Effect, Overturn the Decision

On July 21, 2010, Congress enacted the Investor Protection and Securities Reform Act of 2010.[273] The law explicitly authorizes the SEC to institute extraterritorial claims, and district courts to have jurisdiction over

266. *Martin*, 643 N.E.2d at 747.

267. *Id.* (quoting LHLC Corp. v. Cluett, Peabody & Co., 842 F.2d 928, 931 (7th Cir. 1988)). *Martin* appears to have allowed both the misrepresentations and the injuries it proximately caused to be established on a class-wide basis. It however gave plaintiffs little leeway in showing that the misrepresentations alleged proximately caused the losses complained of. *Id.* at 747–48 (need to show proximate cause but no need to show actual reliance).

268. *See In re* Enron Corp. Sec., Deriv. & ERISA Litig., 490 F. Supp. 2d 784, 814 (S.D. Tex. 2007); *see also* Griffin v. GK Intelligent Sys., Inc., 87 F. Supp. 2d 684, 690 (S.D. Tex. 1999); Steiner v. Southmark Corp., 734 F.Supp. 269, 270 (N.D. Tex. 1990).

269. *In re Enron Corp.*, 490 F. Supp. 2d at 791.

270. TEX. REV. CIV. STAT. ANN. art. 581-33, § A(2) (2001).

271. *See* Hendricks v. Thornton, 973 S.W.2d 348, 360 (Tex. App. 1998) (stating that reliance is not an element of a claim under the TSA); Summers v. WellTech, Inc., 935 S.W.2d 228, 234 (Tex. App. 1996) (stating that the TSA does not require a plaintiff to show that he would not have purchased stock had he know about the alleged adverse material facts).

272. Tex. Capital Sec., Inc. v. Sandefer, 58 S.W.3d 760, 776 (Tex. App. 2001).

273. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 901–991, PL 111-203, 124 Stat. 1376 (2010) (codified as amended 15 U.S.C. § 78a–78lll).

them.[274] The law instructed the SEC to study and solicit public comments respecting extraterritorial private rights of action (§ 929Y). Those comments must have been submitted by February 18, 2011.[275] As the SEC perpetually lacks the resources to pursue what private suitors may, it is hoped that study occurs promptly and results in a recommendation that those private rights be brought into being.

V. CONCLUSION

Economics on a scale that implicates capital raises and public stock markets do not concern themselves merely with profits and losses. They are matters of diplomatic importance. To acknowledge that transnational economies drive international relations, we only need hear Chinese grumbles at having to finance a United States economy whose currency is being degraded by the enlargement by the trillions of the Federal Reserve's balance sheet, and United States complaints about the allegedly undervalued RMB.[276]

It is beyond genuine controversy, therefore, that money talks across the developed and developing worlds, and no country takes kindly to another's interference with their important businesses. The collection of pre-*Morrison* authorities shows that courts in the United States have been mindful of the etiquette associated with allowing foreign persons to use domestic courts to secure money judgments against alien entities.

As the integration of the world's financial markets and their near simultaneous access to common financial information are undeniable imposition of similar consequences by similar means for fraudulent conduct should be an aim of financially developed nations. In the United

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274. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(b) amending Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> (b) EXTRATERRITORIAL JURISDICTION. – The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving –
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

275. *See Comments on Study on Extraterritorial Private Rights of Action*, SEC.GOV (Mar. 31, 2011), http://www.sec.gov/comments/4-617/4-617.shtml.

276. A nearly limitless list of items indicative of ongoing international financial tensions can be found in Damian Paletta, *France, Germany Set-Up G-20 Tiff on Bank Rules*, WALL ST. J., Sept. 2, 2009, at A10; *G20 rift opens on banking reform*, FIN. TIMES, Sept. 5, 2009, at 1. And then there are the ongoing charges by the United States that China is devaluing its currency. See, e.g., Sarah O'Connor, *U.S. Hardens Stance on China's Currency Rigidity*, FIN. TIMES, Oct. 16, 2009, at 8.

States, lawmakers and regulatory agencies should assure the availability of § 10(b), and also opt-out class actions, to any purchaser where the issuer's securities trade on any domestic exchange, and the misconduct complained of has some material connection with operations or other activities in the United States. Countries should be presumed to give *res judicata* effect to judgments in these proceedings, unless a nation affirmatively declares otherwise. Even then, United States courts should have the discretionary power to let the matter proceed in recognition of the practical reality that few, if any, class members, would respond to a final judgment in a defendant's favor by initiating a fresh action abroad.

The desire for blanket exclusion of foreign investment plaintiffs from United States courthouses enhances a wrongdoer's likelihood of escaping full financial liability, and concomitantly weakens deterrence, thereby increasing exposure of both United States and foreign investors to fraud. Laws that insulate wrongdoers should be disfavored.

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